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## Table of Contents

### Article

The New Army Legal Assistance Regulation .....	3
<i>Colonel Alfred F. Arquilla</i>	
<b>USALSA Report</b> .....	47
<i>United States Army Legal Services Agency</i>	
Clerk of Court Note .....	47
Court-Martial Processing Times: The Bad News and the Good	
<b>TJAGSA Practice Note</b> .....	47
<i>Faculty, The Judge Advocate General's School</i>	
Contract Law Note .....	47
"Blanket Acknowledgement" of Amendments Revisited	
<b>Army Lawyer Placement Service Note</b> .....	49
<i>OTJAG Army Placement Service</i>	
Transition Assistance After Regimental Service	
<b>Claims Report</b> .....	50
<i>United States Army Claims Service</i>	
Tort Claims Note (Claims of Department of Defense Components Other than the Military Departments); Personnel Claims Note (Internal Damage to Electronic Items)	
<b>Contract Law Notes</b> .....	51
<i>OTJAG Contract Law Division</i>	
New Guidance for Economic Price Adjustment Clauses; GAO Analysis of the Unbalanced Bid	

<b>Professional Responsibility Notes</b> .....	54
<i>OTJAG Standards of Conduct Office</i>	
Ethical Awareness; Case Summaries; Army Rule 8.4 (Misconduct), Army Rule 1.1 (Competence), Army Rule 4.4 (Respect for Rights of Third Persons)	
<b>Regimental News From the Desk of the Sergeant Major</b> .....	56
<i>Sergeant Major John A. Nicolai</i>	
Senior Legal Noncommissioned Officers Management Course; Legal Automation Army-Wide Bulletin Board System; Army Placement Service; Court Reporter Course	
<b>CLE News</b> .....	57
<b>Current Material of Interest</b> .....	59

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# The New Army Legal Assistance Regulation

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## I. Introduction

This article explains *Army Regulation 27-3, The Army Legal Assistance Program*<sup>1</sup> (AR 27-3), and addresses the changes in the legal assistance program that have occurred over the past two years. AR 27-3 governs the delivery of legal services to soldiers, their families, and other eligible clients on their personal legal affairs, needs, and problems.<sup>2</sup> AR 27-3 is a complete revision of the previous legal assistance regulation,<sup>3</sup> in both content and organization.

The drafting of AR 27-3 began in 1991 in the aftermath of Operations Desert Shield and Desert Storm (Desert Storm)<sup>4</sup>

by the Legal Assistance Task Force—Desert Storm/Demobilization (LATF).<sup>5</sup> The draft regulation incorporates the lessons learned from Desert Storm<sup>6</sup> and other recent conflicts,<sup>7</sup> as well as those that were “relearned” from the 1985 Gander crash.<sup>8</sup>

AR 27-3 is designed to give Army leaders the flexibility to respond to these and other legal assistance emergencies. It is written in language that applies to the active component (AC) and the Reserve components (RC) of the Army<sup>9</sup>—during both peace and war—and to all Army legal offices, regardless of size.<sup>10</sup>

<sup>1</sup>DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM (30 Oct. 1992) [hereinafter AR 27-3]. While the final draft of this regulation was being briefed to The Judge Advocate General (TJAG), the decision was made to drop the acronym “ALAP” from AR 27-3. Although the Army Legal Assistance Program was the first Army activity to use the acronym “ALAP,” the acronym lately has been used more widely to designate the Acquisition Law Assistance Program.

<sup>2</sup>*Id.* para. 2-1a.

<sup>3</sup>DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: LEGAL ASSISTANCE (10 Mar. 1989) [hereinafter AR 27-3 (1989)], superseded by AR 27-3, *supra* note 1.

<sup>4</sup>Operation Desert Shield began shortly after Iraqi military forces invaded Kuwait on 2 August 1990. That operation ended and Operation Desert Storm began upon the commencement of the air campaign by United States and other members of the coalition forces against Iraq on 16 January 1991. Operation Desert Storm also included the ground war against Iraq, which began on 24 February, and was successfully concluded five days later when Kuwait was liberated by United States and other members of the coalition ground forces.

<sup>5</sup>The LATF was established on 29 January 1991 by the then Acting The Judge Advocate General, Major General John L. Fugh. He directed the author of this article to form a task force of Reserve component judge advocates to coordinate the delivery of legal assistance services to the surviving families of soldiers who might be killed during the land war that was then expected to begin at any moment. Following the war, the LATF also coordinated the delivery of legal assistance services to United States Army Reserve (USAR) and Army National Guard (ARNG) soldiers being demobilized. The LATF consisted of one active component (AC), one ARNG, and thirteen USAR judge advocate officer, warrant officer, and enlisted personnel. The author acknowledges the drafting assistance on AR 27-3 provided by Lieutenant Colonel Stephan K. Todd (USAR), Lieutenant Colonel John F. Bender (USAR), and Major Michael T. McCabe (ARNG). The LATF completed its mission on 27 September 1991.

<sup>6</sup>Office of The Judge Advocate General, U.S. Army, Desert Storm Assessment Team Report (22 Apr. 1992) [hereinafter DSAT Report], is a comprehensive report that covers all aspects of judge advocate operations—such as legal assistance, military justice, and claims—provided during Operations Desert Shield and Desert Storm. Although judge advocate operations during the Gulf War were tremendously successful, the DSAT Report lists many areas of concern that call for review, analysis, and possible correction. Legal assistance is listed as the functional proponent in 133 of the 659 “issues” in the DSAT Report and in 57 of the 144 “lessons learned” in the DSAT Report. The LATF addressed many of the issues and lessons learned in the DSAT Report, as well as several that were not listed, such as liability concerns and the scope of legal assistance in the Reserves. AR 27-3 addresses all the legal assistance issues and lessons learned from Desert Storm that are appropriate for incorporation in an Army regulation.

<sup>7</sup>Examples of such recent conflicts include the United States Army deployments to Grenada in 1983 and Panama in 1989.

<sup>8</sup>The Gander crash refers to the crash of a DC-8 aircraft at Gander, Newfoundland, Canada, in which 248 soldiers from the 101st Airborne Division were killed. The soldiers were returning to Fort Campbell, Kentucky, following the completion of a six-month tour of duty with the Multinational Force and Observers in the Sinai Desert, Egypt. The number of soldiers killed in this one crash exceeded the 213 soldiers who died during Desert Storm from both combat and noncombat causes alike.

<sup>9</sup>Unless otherwise indicated, “RC” includes both the USAR and the ARNG. Also, unless otherwise indicated, the term “RC judge advocate” refers to a USAR or ARNG judge advocate.

<sup>10</sup>The term “Army legal office” is used in lieu of “legal assistance office” because legal assistance services frequently are provided by attorneys assigned to small legal offices that do not have a separate legal assistance division or full-time legal assistance attorneys. Additionally, legal assistance services frequently are provided by other attorneys in an Army legal office—such as a staff judge advocate (SJA), deputy SJA, or trial counsel—when the occasion or need arises. The glossary of AR 27-3 defines an Army legal office as “[a] legal office within the active or one of the reserve components of the Army in which one or more attorneys provide legal assistance on a full or part-time basis.” AR 27-3, *supra* note 1, glossary; see also Headquarters, Dep't of Army, Gen. Orders No. 26, para. 3 (15 May 1960) (providing that “Army legal offices . . . operate under the professional guidance of TJAG and in accordance with directives promulgated by TJAG in coordination with the General Counsel of the Army” on matters under the jurisdiction of the Army staff).

During the course of rewriting AR 27-3, all prior regulations and policy letters on legal assistance were reviewed. Much of this material was updated and incorporated. On the other hand, when policies or rules had no rational basis or did not conform to practice, they were discarded. Some of the fictions discarded in the revised regulation included the following:

- Only attorneys designated by staff judge advocates (SJAs) or supervising attorneys provide legal assistance.<sup>11</sup>
- Legal assistance is provided only by legal assistance offices established by commanders.<sup>12</sup>
- Wills, powers of attorney, and other legal help provided to RC soldiers by RC judge advocates in preparation for mobilization is not legal assistance.<sup>13</sup>
- United States Army Reserve judge advocates assigned to troop program units (TPUs) and ARNG judge advocates assist soldiers and other eligible clients with legal problems only while these judge advocates are serving on active duty.<sup>14</sup>
- An AC legal assistance attorney must accompany an RC judge advocate whenever the latter provides in-court representation to a legal assistance client.<sup>15</sup>

## II. Brief History of Legal Assistance

Prior to World War II, no legal assistance program existed in any of the military services. Soldiers and sailors requiring

help with personal legal problems had to hire civilian lawyers.<sup>16</sup> Even a service member with basic legal needs related to military service, such as obtaining a power of attorney for family members left behind, had to meet those needs at his or her own expense without any help from a military attorney.<sup>17</sup>

World War II was accompanied by the induction of millions of citizens and their immediate deployment overseas for extended—and often indefinite—periods. Following the passage of the Selective Training and Service Act in September 1940, and throughout the war, citizens were inducted—often on very short notice and with little time to settle their personal legal affairs. Accordingly, even before the war began, service members needed access to affordable legal help to protect their interests under the Soldiers' and Sailors' Civil Relief Act (SSCRA) and other laws.

In a rapidly growing Army, judge advocates had to be augmented to provide legal assistance, civilian lawyers had to be made available to help soldiers when necessary, and a "method of contact between the serviceman, the lawyer in the service, and the civilian lawyer [had to exist] in order that the latter two could help the first."<sup>18</sup> The legal assistance program and the various bar associations facilitated this contact.

Beginning in September 1940, the military services, in cooperation with the American Bar Association (ABA), began providing legal assistance to service members. Legal assistance was provided during induction to help resolve unsettled legal problems and unsatisfied legal needs. Afterwards, if legal assistance was required on these—or on any new legal problems or needs—military lawyers, working with state and local bar associations, would assist in making referrals to civilian lawyers in the locales where help was required. This cooperative effort between the military services and bar associations also led to the publication of the first legal assistance manuals and deployment "check-lists."<sup>19</sup>

<sup>11</sup>AR 27-3 (1989), *supra* note 3, para. 2-2. For the purpose of consistency throughout AR 27-3 and this article (except in quoted material), the term "civilian lawyer" denotes a person engaged in the private practice of law, and the term "attorney" denotes a judge advocate or a Department of Army (DA) civilian attorney employed to provide legal assistance pursuant to AR 27-3. See AR 27-3, *supra* note 1, glossary.

<sup>12</sup>*Id.* para. 2-3.

<sup>13</sup>*Id.* para. 4-6.

<sup>14</sup>*Id.* para. 2-2a(2). As used in the old regulation, AR 27-3 (1989), *supra* note 3, in the new AR 27-3, and in this article, the term "active duty," as applied to RC personnel, includes inactive duty for training, active duty for training, and annual training (AT). It also includes the full-time periods of active duty performed by RC personnel following full or partial mobilization or when serving as part of the Active Guard Reserve (AGR). Members of the USAR and ARNG assigned to the AGR serve on extended tours of active duty and are considered AC members under AR 27-3. "Active duty" for the ARNG includes periods of "active service"—service on active duty or full-time National Guard duty. See 10 U.S.C. §§ 101 (22), (24), (42) (1988). "Active duty" periods do not include times during which RC judge advocates are not serving on military duty, including periods during which they may be providing legal assistance for retirement points. See *infra* notes 59-60, 174-183, and accompanying texts.

<sup>15</sup>AR 27-3 (1989), *supra* note 3, para. 2-10b(3).

<sup>16</sup>MILTON J. BLAKE, LEGAL ASSISTANCE FOR SERVICEMEN: A REPORT OF THE SURVEY OF THE LEGAL PROFESSION 9 (1951).

<sup>17</sup>Edmund R. Beckwith, *Legal Assistance to Military Personnel*, 29 A.B.A. J. 382, 382 (1943).

<sup>18</sup>BLAKE, *supra* note 16, at 9-14.

<sup>19</sup>Beckwith, *supra* note 17, at 382, 384. One checklist contained 26 topical headings and covered everything from bank deposits, leases, and mortgages, to guardianship of children.

The first official recognition of legal assistance in the military services (in this case the Army) occurred on 16 March 1943. On this date, fifty years ago, *War Department Circular No. 74*<sup>20</sup> was published. This circular required The Judge Advocate General (TJAG) to work closely with the Committee on War Work of the ABA—and SJAs to work with like-named committees of the various state bar associations—to develop a uniform approach “to make adequate legal advice and assistance available throughout the Military Establishment to military personnel in the conduct of their personal affairs.” By the end of the war, over 1600 legal assistance offices in the Army had performed this important mission.

Following World War II, the ABA and all military services decided that the legal assistance program

should be continued as a permanent activity in the armed forces, not only because of the need of those in the service for such assistance, but also as a matter of national defense in having the system maintained in effect, even if on a greatly reduced basis, so that it could be expanded without delay to meet any future national security emergency.<sup>21</sup>

The character of the Army’s legal assistance program has varied considerably over the years. During World War II and the Korean War, legal assistance was little more than a referral program in which Army lawyers provided general legal counseling, but referred most of the actual legal work, including wills and powers of attorney, to civilian lawyers.<sup>22</sup> The

legal work provided by civilian lawyers to soldiers and their families usually was not free. The bar associations generally assisted service members only in finding “competent” and “sympathetic” lawyers who would “give due consideration to the serviceman’s ability to pay reasonable fees for necessary services.” Nevertheless, procedures existed for referring so-called “charity cases” to legal aid offices.<sup>23</sup>

Even as late as 1965, the role of a legal assistance attorney was little more than that of a “legal advisor and consultant” who had to abide by extensive limitations that were placed on the preparations of tax returns, pleadings, briefs, official correspondence, and even letters written on behalf of clients.<sup>24</sup> During the late 1960s and throughout the 1970s, these limitations began to fall by the wayside as a result of several developments. One was the so-called 1969 Carey Amendment to the Economic Opportunity Act of 1964,<sup>25</sup> which extended legal services to certain enlisted personnel and their families. Nevertheless, because these expanded legal assistance services were provided by attorneys working for the then-Office of Economic Opportunity, rather than judge advocates, the Carey Amendment implied that the military no longer could, or should, “take care of its own.”<sup>26</sup> Another development was the effort on the part of Army lawyers to remove unnecessary restrictions that hampered their legal representation of clients.<sup>27</sup> Finally, many believed that expanding legal assistance services would make the Army a more attractive career for lawyers while helping to ease the Army’s then-existing Judge Advocate General’s Corps (JAGC) officer retention problem.

<sup>20</sup> War Dep’t, Circular No. 74, Legal advice and assistance for military personnel (16 Mar. 43) [hereinafter Cir. No. 74]. This circular “institut[ed], for the first time in the history of the armed forces, an official, uniform and comprehensive system for making legal advice and assistance available to military personnel and their dependents in regard to their personal legal affairs.” BLAKE, *supra* note 16, at 16-17. A similar evolution of the legal assistance program took place in the Navy during World War II. The first official recognition of the Navy program occurred with the publication of a letter from the Acting Secretary of the Navy in 1943. See Letter, JAG:JL:ac, Legal Assistance for Navy Personnel (26 June 1943), reprinted in Dep’t of Navy, Navy Bulletin R-1164 (1 July 1943). The Army Air Forces recognized its own program later that year. See DEP’T OF ARMY, ARMY-AIR FORCE REG. 110-1 (23 Dec. 1943); BLAKE, *supra* note 16, at 19-20, 31.

<sup>21</sup> BLAKE, *supra* note 16, at 48. The content of Cir. No. 74, *supra* note 20, was incorporated in the Army’s first legal assistance regulation, WAR DEP’T, ARMY REG. 25-250, JUDGE ADVOCATE GENERAL DEPARTMENT: LEGAL ASSISTANCE (14 May 1946) [hereinafter AR 25-250 (1946)]. This regulation adopted the Army legal assistance plan as a War Department program. See *id.* para. 1c; BLAKE, *supra* note 16, at 53. Following the establishment of the Department of Defense (DOD), the legal assistance plan was adopted as a DA program. See DEP’T OF ARMY, REG. 600-103, PERSONNEL: LEGAL ASSISTANCE, para. 1c (29 June 1951) [hereinafter AR 600-103 (1951)].

<sup>22</sup> BLAKE, *supra* note 16, at 9; Milton J. Blake, *Legal Assistance for Servicemen: A Contribution in War and Peace*, 37 A.B.A. J. 9, 9-10 (1951) [hereinafter *Legal Assistance for Servicemen*]. See generally AR 600-103 (1951), *supra* note 21, paras. 2, 6, 7, 10.

<sup>23</sup> *Legal Assistance for Servicemen*, *supra* note 22, at 10. This is in stark contrast to the recent Persian Gulf War during which numerous bar associations provided free legal advice and assistance, regardless of financial need, to soldiers and families. This assistance also was provided to surviving family members of soldiers who died during the war effort. The provision of free legal services during the Persian Gulf War undoubtedly was the result of the increasing emphasis on *pro bono* work in bar associations across the United States over the past several decades. Additional factors were the patriotism of the civilian lawyers offering their legal services and the support for the war’s cause among the American people. The five-month duration of the military build-up for the Gulf War also gave bar associations the necessary time to organize their efforts. Obviously, if legal assistance is an essential military program for service members and their families, it must not be entirely dependent on the popularity of a particular war or military operation, nor can it depend heavily on the volunteer efforts of civilian lawyers. These volunteer efforts naturally are less forthcoming during peacetime.

<sup>24</sup> See generally Office of the Judge Advocate General, U.S. Army, JAGAA Bull. No. 1965-3A, Army Legal Assistance Program, sec. V (4 Mar. 1965).

<sup>25</sup> S. 3016, 91st Cong., 1st Sess. (1969) (Carey Amendment) (amending Economic Opportunity Act, para. 222(a)(30), 42 U.S.C. § 2701 (1988)).

<sup>26</sup> F. Raymond Marks, *Military Lawyers, Civilian Courts, and the Organized Bar: A Case Study of the Unauthorized Practice Dilemma*, 56 MIL. L. REV. 1, 8 (1972).

<sup>27</sup> These two developments gave rise to the in-court representation program. See DEP’T OF ARMY, REG. 608-50, PERSONAL AFFAIRS: LEGAL ASSISTANCE, para. 4d (22 Feb. 1974) [hereinafter AR 608-50 (1974)].

Over the years, legal assistance in the Army has evolved from a referral program into the comprehensive program that exists today, as exemplified by AR 27-3. When referrals to civilian lawyers occur, they generally are made because the legal relief that clients are seeking can be obtained only in court. Even then, clients at many installations are assisted in proceeding *pro se* on certain legal matters or, in some instances, provided in-court representation by Army lawyers.

Since World War II, during periods of peace and war—as well as military build ups and reductions—legal assistance has been provided on a continuous basis in each of the military services. No reason exists to believe that this will change in the future. The Army always has taken the lead in legal assistance—both in terms of the scope of legal services provided and the eligibility of clients authorized to receive those services—and continues to do so today.

### III. Legal Basis for Legal Assistance

The legal basis for the Army Legal Assistance Program is found at 10 U.S.C. § 3013(g), which authorizes the Secretary of the Army to “prescribe the duties of members of the Army and civilian personnel of the Department of the Army . . . and . . . prescribe regulations to carry out his functions, powers, and duties under this title.”<sup>28</sup> Those functions, described in subparagraph (b) of the statute, include “[s]ervicing,” “[m]obilizing,” “[d]emobilizing,” “[a]dministering” (including the morale and welfare of personnel), and “[m]aintaining.”<sup>29</sup>

Another statutory basis for the Army Legal Assistance Program is 10 U.S.C. § 1044, which provides as follows:

#### § 1044. Legal assistance

(a) Subject to the availability of legal staff resources, the Secretary concerned may provide legal assistance in connection with their personal civil legal affairs to—

(1) members of the armed forces under his jurisdiction who are on active duty;

(2) members and former members under his jurisdiction entitled to retired or retainer pay; and

(3) dependents of members and former members described in clauses (1) and (2).

(b) Under such regulations as may be prescribed by the Secretary concerned, the Judge Advocate General (as defined in Section 801(1) of this title) under the jurisdiction of the Secretary is responsible for establishment and supervision of legal assistance programs under this section.

(c) This section does not authorize legal counsel to be provided to represent a member or former member of the armed forces, or the dependent of a member or former member, in a legal proceeding if the member or former member can afford legal fees for such representation without undue hardship.

(d) The Secretary concerned shall define “dependent” for the purposes of this section.<sup>30</sup>

The Army never has interpreted this 1984 statute to be a limitation on legal assistance.<sup>31</sup> The statute merely states what may be done (and what already was being done), and contains no prohibitions whatsoever. The language of this statute represents a compromise reached among the ABA and others who sought to make legal assistance in the military services a statutory entitlement and those who opposed that idea, particularly in the absence of congressional funding to support a mandatory legal program. The legal assistance program, which had its inception during World War II, predates this statute by several decades, and already had statutory authorization under 10 U.S.C. § 3013(g).<sup>32</sup>

### IV. Organization of AR 27-3

AR 27-3 is organized into five chapters with two appendices. Chapter 1, entitled “Introduction,” states the statutory basis for the Legal Assistance Program<sup>33</sup> and describes in great detail the responsibilities that TJAG; the Chief, Army Legal Assistance Division, Office of The Judge Advocate

<sup>28</sup> 10 U.S.C. § 3013(g)(1), (3) (1988).

<sup>29</sup> *Id.* § 3013(b)(6)-(10).

<sup>30</sup> *Id.* § 1044.

<sup>31</sup> See Legal Assistance for the Army Materiel Command Mobile Civilian Emergency Essential Employees, Op. Admin. L. Div., Off. JAG, Army, DAJA-AL 2763 (2 Oct. 1986). The subsequent enactment of 10 U.S.C. § 1044a (Pub.L. 101-510, div. A, tit. V, § 551(a)(1), 104 stat. 1566 (1990) (codified as 10 U.S.C. § 1044a)—concerning Armed Forces’ members notarial capabilities—expressly recognizes that Department of Defense (DOD) regulations may authorize legal assistance for persons other than those listed in 10 U.S.C. § 1044 (1988).

<sup>32</sup> The provision of legal assistance services to RC soldiers, various DOD civilian employees, and other eligible clients under certain circumstances is based on 10 U.S.C. § 3013(g). See AR 27-3, *supra* note 1, paras. 2-5a(3), (6), (7), (10), (11). In-court representation under the Army Legal Assistance Program is more restrictive than 10 U.S.C. § 1044(c). See *id.* para. 3-7g(2)(d) (generally limiting in-court representation to soldiers “[f]or whom hiring civilian lawyers would entail substantial financial hardship to themselves and their families”).

<sup>33</sup> AR 27-3, *supra* note 1, para. 1-1.

General (OTJAG); the Chief, United States Army Trial Defense Service (USATDS); the Commandant, The Judge Advocate General's School, Army (TJAGSA); commanders; SJAs; and other supervising attorneys have in the Legal Assistance Program.<sup>34</sup> Almost all this material is new.

Chapter 2, entitled "Legal Assistance Providers and Clients," describes the mission of the Legal Assistance Program<sup>35</sup> and its military basis,<sup>36</sup> and describes who is authorized to provide<sup>37</sup> and to receive<sup>38</sup> legal assistance. It also outlines procedures for limiting legal assistance to certain categories of clients or to certain services.<sup>39</sup>

Chapter 3, entitled "Legal Assistance Services," provides policy guidance on the preventive law<sup>40</sup> and client legal services that make up the Legal Assistance Program. A clear distinction is made between the different types of legal assistance cases<sup>41</sup> and the different types of legal assistance services.<sup>42</sup> This distinction between cases and services also is used in the new record and reporting forms and procedures discussed in Chapter 5.

Chapter 4, entitled "Professional Matters," provides policy guidance on matters concerning professional conduct and resources. This chapter, however, does not restate any of the Rules of Professional Conduct for Lawyers.<sup>43</sup> Instead when necessary, the chapter merely incorporates these rules by reference and provides related legal assistance policies and procedures.<sup>44</sup> As to professional resources, this chapter addresses two important resources available to attorneys providing legal assistance: The Legal Automation Army-Wide System—Legal Assistance (LAAWS-LA) computer software program<sup>45</sup> and the Judge Advocate General's Corps (JAGC) Reserve Officer Legal Assistance Directory.<sup>46</sup> This chapter also adds entirely new material on liability issues pertaining to the provision of legal services and on the authorized use of volun-

teers in the Army Legal Assistance Program.<sup>47</sup> Neither of these subjects ever has been addressed previously in Army legal assistance regulations.

Chapter 5, entitled "Administration," provides policy guidance on the control of privileged information, and discusses two newly revised legal assistance forms: *DA Form 2465* (Client Legal Assistance Record) and *DA Form 4944-R* (Report on Legal Assistance Services). These reports are incorporated in the LAAWS-LA software program so that legal assistance client records and statistical reports may be maintained and printed using desk-top computers.

Sections I and II of appendix A to AR 27-3 list every Army regulation involved in providing legal assistance. These sections should serve as a useful reference for attorneys trying to find the number of an Army regulation on a particular subject. Appendix B to AR 27-3 contains the instructions for completing the new legal assistance forms. Finally, the glossary contains listings of all the abbreviations and comprehensive definitions of all the terms used in AR 27-3. The definitions are required reading for anyone trying to gain a clear understanding of AR 27-3.

## V. Legal Assistance Mission

The mission of the Army Legal Assistance Program is stated in AR 27-3 as follows:

The mission of the legal assistance program is to assist those eligible for legal assistance with their personal legal affairs in a timely and professional manner by—

<sup>34</sup>*Id.* para. 1-4.

<sup>35</sup>*Id.* para. 2-1a.

<sup>36</sup>*Id.* para. 2-1b.

<sup>37</sup>*Id.* para. 2-2.

<sup>38</sup>*Id.* para. 2-5.

<sup>39</sup>*Id.* para. 2-6.

<sup>40</sup>*Id.* paras. 3-3, 3-4.

<sup>41</sup>*Id.* para. 3-6.

<sup>42</sup>*Id.* para. 3-7.

<sup>43</sup>DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, app. B (7 Apr. 1992) [hereinafter AR 27-26].

<sup>44</sup>See AR 27-3, *supra* note 1, para. 4-1 (professionalism); *id.* para. 4-2 (liaison with the civilian bar); *id.* para. 4-3 (liability); *id.* para. 4-7 (ethical standards); *id.* para. 4-8 (attorney-client privilege); *id.* para. 4-9 (conflict of interest); *id.* para. 4-10 (investigations and advisory opinions).

<sup>45</sup>AR 27-3, *supra* note 1, para. 4-4.

<sup>46</sup>*Id.* para. 4-5.

<sup>47</sup>*Id.* para. 4-3.

(1) Meeting their needs for information on personal legal matters.

(2) Resolving their personal legal problems whenever possible.<sup>48</sup>

The first part of the mission addresses preventive law. Soldiers and their families need to be informed of legal issues and services so that their actions or inactions do not cause them legal difficulties or unnecessary expenses. The second part of this mission involves the legal assistance services that are provided directly to eligible clients on their personal legal problems and needs.

AR 27-3, and previous Army legal assistance regulations, are based on the premise that legal assistance services directly support the military mission, that these legal services must be continuous during both peace and war, and that they must provide more than just referral assistance. To ensure that commanders and Army lawyers do not lose sight of the reasons why Army lawyers provide free legal assistance services—particularly during the present post-Cold War period and resulting budget reductions occurring within all the military services—the military basis of the program is stated in AR 27-3 in great detail. AR 27-3 indicates that the legal assistance program is based on the following four military needs:

(1) *Readiness.* Because AC and RC soldiers and emergency-essential DA employees must be prepared for immediate mobilization and deployment, their personal legal affairs must be in order at all times. Although the goal is to prepare soldiers for such eventualities well in advance of their occurrence, the future legal needs of many soldiers cannot always be anticipated or met even under the best of plans. Possessing the capability to deliver legal assistance on short notice to great numbers during a brief period of time is essential to readiness.

(2) *Morale.* Fostering the high morale of soldiers and their families is an important aspect of readiness. High morale is enhanced by providing soldiers and their families

information, advice, and assistance responsive to their personal legal needs and problems.

(3) *Discipline.* Personal legal difficulties may cause low morale and disciplinary problems and may adversely affect combat readiness. Prompt legal assistance in resolving these difficulties is an effective preventive law measure.

(4) *Quality force.* Providing legal assistance is part of the Army's ongoing effort to maintain a quality of life that will attract quality people. The Army must take care of its own if it is to recruit and retain a quality force.<sup>49</sup>

## VI. Legal Assistance Responsibilities

### A. General

Unlike prior Army legal assistance regulations, AR 27-3 lists the responsibilities of those assigned to various positions in Headquarters, Department of the Army (HQDA), and at each Army installation, in carrying out the mission of the Army Legal Assistance Program. TJAG "is responsible for the overall supervision and administration of the legal assistance program." Additionally, for the first time, TJAG is authorized to grant exceptions to AR 27-3 on his or her own initiative or in response to a request from a commander.<sup>50</sup>

The legal assistance responsibilities of others listed in AR 27-3 include the Commandant, TJAGSA, whose instructors train Army lawyers "in areas of the law, policy, doctrine, and professional responsibility that are relevant to legal assistance," and who update legal assistance materials, including the content of the LAAWS-LA software program, which are used in providing legal assistance.<sup>51</sup> Also listed is the Chief, Information Management Office, OTJAG, who produces and distributes periodic updates of the LAAWS-LA software program to legal assistance attorneys throughout the Army,<sup>52</sup> and the Chief, USATDS, who, subject to other USATDS missions, makes USATDS attorneys available to provide legal assistance.<sup>53</sup>

<sup>48</sup>*Id.* para. 2-1a.

<sup>49</sup>*Id.* para. 2-1b.

<sup>50</sup>*Id.* at 1 (Proponency and Exceptions); *id.* para. 1-5. These provisions were incorporated as a result of one lesson learned from Desert Storm. During the Gulf War, legal assistance was extended for a period of one year to the primary next of kin (PNOK), including parents, of all soldiers who died during Desert Storm, and to RC soldiers being demobilized for legal problems arising from, or aggravated by, Desert Storm operations. See Message, Headquarters, Dep't of Army, DAJA-ZA, subject: Legal Assistance for Desert Storm (271700Z Feb 1991) [hereinafter Message (27 Feb. 1991)]; Message, Headquarters, Dep't of Army, subject: Desert Storm/Demobilization Legal Assistance (051830Z Mar 91) [hereinafter Message (5 Mar. 1991)]. TJAG did not have authority to grant these exceptions under the old regulation. See AR 27-3 (1989), *supra* note 3. Precious time was lost in obtaining approval for these exceptions from the Secretary of the Army. Such exceptions, however, are now permanent features of AR 27-3. AR 27-3, *supra* note 1, para. 2-5a(3)(a), (8), (9).

<sup>51</sup> AR 27-3, *supra* note 1, para. 1-4d.

<sup>52</sup>*Id.* para. 1-4e.

<sup>53</sup>*Id.* para. 1-4c.



The legal assistance responsibilities of other officials listed in AR 27-3 are discussed in greater detail below.

*B. Chief, Legal Assistance Division, Office of The Judge Advocate General*<sup>54</sup>

The Chief, Legal Assistance Division, OTJAG, "is responsible for the overall supervision and administration of the legal assistance program," and for promulgating legal assistance policies and procedures.<sup>55</sup> This officer also has limited authority to grant exceptions on a case-by-case basis to the provisions of AR 27-3 that govern who is authorized to provide and receive legal assistance. This officer also may grant exceptions as to the nature of the legal assistance that may be provided.<sup>56</sup>

In light of lessons learned from the recent Persian Gulf War, AR 27-3 gives specific responsibility to the Chief, Legal Assistance Division, to "[a]dvise TJAG on legal assistance problems and needs, including those that arise during war or national emergencies, or during or following any local disaster that causes an increased need for legal services from eligible clients . . . ."<sup>57</sup> In a war or other crisis in which a large number of American casualties occur or are expected to occur, or in which the Reserves are expected to be called to active duty

in great numbers, Army lawyers must be prepared to meet the increased legal assistance demand with all available resources, including the timely mobilization of RC judge advocates when necessary.<sup>58</sup>

AR 27-3 also designates the Chief, Legal Assistance Division, as the "sole authority" for authorizing RC judge advocates to earn retirement points for legal assistance work performed when not on active duty.<sup>59</sup> Under AR 27-3, the Chief, Legal Assistance Division, also serves as the "supervising attorney" for RC judge advocates not assigned to a TPU or the ARNG "when they are performing legal assistance work for retirement points."<sup>60</sup>

*C. Commanders*

Legal assistance is a commander's program.<sup>61</sup> This is significant because the Army would not provide legal assistance unless commanders actually wanted legal assistance services available to their soldiers and other eligible clients.

Because legal assistance is not mandated by any law or regulation—not even AR 27-3—the commander of each military installation or other activity must determine whether legal assistance services will be made available to soldiers and

<sup>54</sup>This position formerly was Chief, Army Legal Assistance Program, and Chief, Army Legal Assistance Office. The new AR 27-3 changes the designation to eliminate confusion and to emphasize that the primary responsibility of this officer in OTJAG is to recommend and carry out legal assistance policy in the Army. This officer's secondary mission is to provide Army legal assistance services in the Pentagon to eligible clients.

<sup>55</sup>*Id.* para. 1-4b(1).

<sup>56</sup>For example, pursuant to this authority, the Chief, Legal Assistance Division, OTJAG, has granted exceptions by SJAs to allow certain RC officers, although not commissioned as judge advocates, to serve as legal assistance attorneys during active duty for training (ADT). He also has authorized legal assistance services to continue for the surviving wife of a soldier, even though the soldier died in an absent-without-leave status and had been dropped from the rolls. In addition, he has authorized exceptions to provide in-court representation for clients who had not fully satisfied the criteria for such assistance. *But see infra* note 76 and accompanying text.

<sup>57</sup>*Id.* para. 1-4b(4).

<sup>58</sup>*See also id.* para. 1-4g(11) (requiring SJAs to consider "recommending that RC judge advocates be called to active duty" during war and other situations that might cause "an increased need for legal assistance services from eligible clients"). During the Persian Gulf War, both AC and RC judge advocates met the increased demand for legal assistance occasioned by mobilization and deployment, and by the casualty assistance effort that followed. The latter effort, however, was a success primarily because of the small number of casualties that occurred. *See supra* note 8. The personnel staffing of the Casualty and Memorial Affairs Operations Center in Alexandria, Virginia, increased from a peacetime authorization of 42 on 2 August 1990, to 350 by 15 February 1991, to meet a then-anticipated soldier casualty rate of 5000 to 10,000 per week in a war that was expected to last five weeks. In contrast, efforts to establish the LATF did not even begin until 29 January 1991, which was 13 days after the air war against Iraq began. *See supra* notes 4 and 5. In addition, legal assistance was seriously understaffed at several installations from which large numbers of soldiers were deployed and whose units were expected to suffer many casualties. A few installations from which deployments occurred did not leave behind enough attorneys at their installations to handle even the routine legal assistance generated by the families left behind. One major overseas command, which deployed several divisions to Southwest Asia, even refused to use RC judge advocates to replace those who deployed. Had the projected level of casualties occurred, meeting the demand for legal services from the PNOK—including minor children of sole parents, particularly those living overseas with family care providers, or just neighbors—would have been almost impossible.

<sup>59</sup>AR 27-3, *supra* note 1, para. 1-4b(2). Retirement points are awarded pursuant to DEP'T OF ARMY, REG. 140-185, TRAINING AND RETIREMENT POINT CREDITS AND UNIT LEVEL STRENGTH ACCOUNTING RECORDS, para. 2-4b(3) (15 Nov. 1979); *id.* tbl. 2-1, rule 16; DEP'T OF ARMY, NAT'L GUARD BUREAU REG. 680-2, AUTOMATED RETIREMENT POINTS ACCOUNTING SYSTEM, tbl. 2-5, rule 9 (1 Mar. 89).

<sup>60</sup>AR 27-3, *supra* note 1, glossary.

<sup>61</sup>*Id.* para. 1-4f, 2-1b. Although this was not stated specifically in the old regulation, *see* AR 27-3 (1989), *supra* note 3, or prior legal assistance regulations, it was implied. This statement represents no change in philosophy regarding the legal assistance program since its inception in 1943. Circular No. 74, *supra* note 20, para. 4, provided as follows:

4. Establishment and authority.—The commanding general of each service command and the commanding officer of each post, camp, and station within the 48 States and the District of Columbia will establish a legal assistance office for his respective command. . . . The commanding officer of any other installation, including an overseas command, may, if he deems it advisable, establish such an office, with such modifications as may be necessary to meet local conditions.

other eligible clients. The commander decides whether legal assistance will be provided and, if so, the scope of the legal assistance services that will be provided. The commander determines the extent of the services through the authorization and staffing of legal assistance military and civilian personnel positions and the allocation of other resources, such as building space and money in the command. Therefore, whether or not a legal assistance program exists is dependent on whether the installation or activity commander<sup>62</sup> has "one or more" AC, RC, or DA civilian attorneys assigned to his or her staff "who provide legal assistance on either a full or part-time basis as part of their duty or job descriptions."<sup>63</sup> If, as defined, a commander has a legal assistance program in his or her command, then the commander is responsible for supporting it with adequate funding, staffing, and facilities.<sup>64</sup>

A number of small Army commands and installations also have legal assistance programs. Some have no AC, RC, or DA civilian attorneys assigned, while others may have one or more attorneys assigned. None of them, however, provide legal assistance "as part of their duty or job descriptions." If legal assistance is not mentioned as part of their duties or job descriptions, these attorneys still may provide legal assistance on an intermittent basis as long as they comply with AR 27-3.<sup>65</sup> The only consequence that the absence of a legal assistance program has, in this regard, is that a commander does not have to carry out the responsibilities specified in AR 27-3.<sup>66</sup>

## D. Supervising Attorneys

Whether or not a legal assistance program exists, supervising attorneys are responsible for all legal assistance services provided in their commands or on their installations.<sup>67</sup> The term "supervising attorney" includes an SJA; deputy SJA; chief of legal assistance; and any other AC, RC, or civilian attorney exercising supervisory authority over those providing legal assistance services.<sup>68</sup> Given the wide range of sizes and primary missions in AC and RC legal offices throughout the Army, AR 27-3 leaves to SJAs the decision on who in their offices may exercise authority over various legal assistance matters. Therefore, within a particular legal office, more than one supervising attorney likely will exist. AR 27-3 leaves to an SJA (or other principal legal advisor) the decision on the extent to which, if at all, authority on legal assistance matters is delegated within a particular legal office to subordinate supervising attorneys.<sup>69</sup>

Other responsibilities of supervising attorneys include coordinating legal assistance policies with local courts and bar associations where they might have an interest in these policies, involving commanders with their legal assistance programs—particularly in the area of preventive law and income tax assistance, and training legal assistance personnel.<sup>70</sup>

<sup>62</sup>Whether the commander exercises a particular type of court-martial jurisdiction is no longer relevant. See AR 27-3, *supra* note 1, glossary (definition of commander).

<sup>63</sup>*Id.* para. 1-4f. The new AR 27-3 eliminates the requirement, which has existed since 1946, that commanders publish orders announcing the establishment of legal assistance offices. See AR 25-250 (1946), *supra* note 18, para. 4c. Similarly, the old regulation, AR 27-3 (1989), *supra* note 3, para. 2-3, required a commander to publish an order announcing the establishment of a legal assistance office, and forward a copy of this order to OTJAG. When a recent litigation issue arose about the authority of a particular legal office to provide legal assistance, personnel discovered that the Legal Assistance Division, OTJAG, did not maintain a file containing copies of these orders. The requirement, however, made little sense because the attorneys in a legal office undoubtedly would be providing some legal assistance even before such an order was published. This unnecessary requirement only served to call into question the authority—as well as the exposure to potential liability—of attorneys providing legal assistance in locations not designated as legal assistance offices. The new AR 27-3 simply recognizes that the existence or scope of a legal assistance program at any particular Army installation, or in the Army as a whole, is entirely dependent on resources, including the authorization and staffing of positions. It also acknowledges that decisions on resources are made by commanders; HQDA; the Office of Secretary of Defense (OSD); and Congress.

<sup>64</sup>AR 27-3, *supra* note 1, para. 1-4f.

<sup>65</sup>*Id.* at 1 (Applicability); *id.* para. 2-2. Those authorized to provide legal assistance under paragraph 2-2 may provide legal assistance "[u]nless inconsistent with superior orders or other duties or responsibilities . . ." The existence of a legal assistance program is not a precondition to providing legal assistance. Full compliance with AR 27-3, however, still is required. For example, only authorized legal services may be provided and only eligible legal assistance clients may be assisted.

<sup>66</sup>*Id.* para. 1-4f(1). The responsibilities of supervising attorneys are not dependent on the existence of a legal assistance program. See *id.* para. 1-4g.

<sup>67</sup>*Id.* para. 1-4g.

<sup>68</sup>*Id.* The glossary to AR 27-3 defines "supervising attorney" as follows:

A staff or command judge advocate, deputy staff or deputy command judge advocate, judge advocate officer in charge, chief of legal assistance, DA civilian attorney, or other AC or RC judge advocate officer exercising supervisory responsibilities over Army legal assistance services. This term also includes commanders of Legal Services Organizations within the U.S. Army Reserve and commanders of JAGC detachments specifically designated to perform legal assistance missions. Supervisory responsibilities may be limited or further delegated by competent authority. The Chief, Army Legal Assistance Division, OTJAG serves as the supervising attorney of RC judge advocate officers in the Army, who are not assigned to the ARNG or to USAR TPU's, when they are performing legal assistance work for retirement points.

<sup>69</sup>*Id.* glossary; *id.* para. 1-4g(1).

<sup>70</sup>*Id.* para. 1-4g(5), (6), (7), (8), (10).

## VII. Legal Assistance Providers

Unlike the 1989 regulation, AR 27-3 deliberately omits any use of the terms "legal assistance attorney" or "legal assistance office." This omission is not intended to suggest that AR 27-3 abolishes these terms; rather, it suggests that, from a regulatory perspective, no difference exists among legal assistance provided in an office designated as a "legal assistance office," in another setting,<sup>71</sup> or by an attorney whose duty position is a full or part-time legal assistance attorney or something else. Those who provide legal assistance are governed by AR 27-3 regardless of whether or not a legal assistance program exists on the installation or command to which they are assigned.

No longer does one have to be officially designated as a legal assistance attorney before he or she can provide legal assistance.<sup>72</sup> AR 27-3 authorizes every judge advocate and every civilian attorney to provide legal assistance "unless inconsistent with superior orders or other duties or responsibilities."<sup>73</sup> This change is designed to address liability concerns raised by some judge advocates, both in the RC and AC, who provided legal assistance during Desert Storm, but who never were designated officially as legal assistance attorneys. This change also is intended to provide SJAs with the flexibility in legal assistance emergency situations to use all personnel resources available—including civilian attorneys who ordinarily do not provide legal assistance.<sup>74</sup>

Those authorized to provide legal assistance are summarized as follows:

(1) All judge advocates serving on active duty regardless of component.

(2) All USAR and ARNG judge advocates assigned to judge advocate positions in troop program units (TPUs) and all ARNG judge advocates assigned to judge advocate positions, even while in civilian status when providing legal assistance in accordance with AR 27-3.

(3) All USAR and ARNG judge advocates, regardless of assignment, who have been authorized to provide legal assistance by the Chief, Legal Assistance Division, OTJAG, when they are not serving on active duty (including inactive duty for training, AT, and active duty for training).

(4) DA civilian attorneys.

(5) Licensed or otherwise professionally qualified attorneys under foreign law who are employed by the United States Army and who work under the direction of a supervising attorney while providing legal assistance on foreign law matters.<sup>75</sup>

The list of providers is limited to attorneys and does not include paralegals or clerical staff. The omission of nonlawyers is deliberate. Nonlawyers do not provide legal assistance; rather, they assist attorneys in providing legal assistance. An attorney is always responsible for the legal assistance provided to a client.

The Chief, Legal Assistance Division, OTJAG, has authority to grant exceptions to AR 27-3 on who may provide legal assistance on a case-by-case basis. This authority, however, cannot be used to authorize volunteers to provide legal assistance.<sup>76</sup>

## VIII. Liability

AR 27-3 is the first legal assistance regulation to contain a full discussion on the subject of liability protection for legal assistance providers and their assistants, and on the related issue regarding the authorized use of volunteers in the legal assistance program. These subjects are discussed fully because of the numerous questions that arose during and following the Persian Gulf War. The issue of liability was primarily a concern among RC judge advocates,<sup>77</sup> while questions about using volunteers came from AC judge advocates.

<sup>71</sup>*Id.* para. 3-2b.

<sup>72</sup>See AR 27-3 (1989), *supra* note 3, para. 2-2a (requiring an SJA to designate active and Reserve officers, as well as DA civilian attorneys, as legal assistance attorneys before they could provide legal assistance); see also DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE, para. 2-5a (15 Sept. 1989) [hereinafter AR 27-1] (providing that only judge advocate officers detailed or made available by their superiors can represent, advise, or enter into attorney-client relationships with individual clients) (presently under revision). The draft revision to AR 27-1 presently states that attorneys "should not provide legal advice to others when doing so may result in a conflict of interest with their primary duties." Office of The Judge Advocate General, U.S. Army, Draft Revision, Dep't of Army Reg. AR 27-1, para. 2-5a (unpublished draft revision) (forthcoming n.d.) [hereinafter DRAFT REVISION TO AR 27-1].

<sup>73</sup>AR 27-3, *supra* note 1, para. 2-2a.

<sup>74</sup>For DA civilian attorney employees whose primary duties do not include legal assistance, SJAs should include legal assistance as a secondary duty in their job descriptions to ensure greater flexibility in shifting resources in the event of mobilization, deployments, or other emergency situations. See AR 27-3, *supra* note 1, para. 2-4a.

<sup>75</sup>*Id.* para. 2-2a.

<sup>76</sup>See *id.* para. 1-4b(3) (providing that Chief, Legal Assistance Division, OTJAG, may authorize exceptions to who may provide legal assistance "if not inconsistent with the requirements set by statute"); *infra* notes 98-100 and accompanying text.

<sup>77</sup>See *infra* notes 156-173 and accompanying text.

An attorney who provides legal assistance in accordance with AR 27-3 is performing an official function of the United States Army.<sup>78</sup> AR 27-3 provides specific guidance to attorneys, paralegals, and others involved in providing legal assistance—as well as to claimants—on how to proceed when a malpractice claim is made.<sup>79</sup> This guidance discusses the exclusive remedy provided by the Federal Tort Claims Act (FTCA)<sup>80</sup> for these claims, the way in which those sued may request to be represented by the Department of Justice,<sup>81</sup> and the way in which those who have paid money to defend against these claims on their own may obtain indemnification from the United States Government.<sup>82</sup>

AR 27-3 now provides a bright-line rule as to whether the activities of an AC or RC attorney come within the coverage of the FTCA. The bright-line rule poses the following questions: (1) did the act or omission giving rise to a claim occur during the course of providing legal assistance services on a “no-fee” basis?; (2) was the attorney authorized to provide these services under AR 27-3?; and (3) was the client eligible to receive these services under AR 27-3?<sup>83</sup> If the answer to each of these questions is an unqualified “yes,” the attorney is acting within the scope of his or her military duties and the exclusive remedy provided by the FTCA applies. The bright-line rule also applies to the act or omission of any employee—such as a secretary or paralegal—or a volunteer supporting the legal assistance services being provided by an attorney that gave rise to a claim.

## IX. Volunteers

AR 27-3 is the only Army regulation that provides detailed guidance on the use of volunteers in an Army legal office.<sup>84</sup>

This guidance, for the most part, would apply not only to Army legal assistance services, but also to other Army legal services. This guidance also addresses the closely related issue of FTCA liability for the activities of volunteers.<sup>85</sup> The following types of volunteers may be used to support Army legal assistance services:

- (1) Those who provide tax assistance as part of the Internal Revenue Service (IRS) Volunteer Income Tax Assistance (VITA) program.<sup>86</sup>
- (2) Those who provide tax assistance services through Army Community Service (ACS) and official family support groups.<sup>87</sup>
- (3) Student volunteers who assist those providing legal assistance services.<sup>88</sup>

AR 27-3 provides the statutory and regulatory restrictions that apply to the use of volunteers in the Army Legal Assistance Program. AR 27-3 obviously does not apply to volunteer or other activities outside of the legal assistance program. For example, AR 27-3 restrictions on eligible legal assistance clients do not apply to volunteers who provide tax assistance under the VITA or ACS Programs unless they are performing duties under the supervision of Army legal office personnel.<sup>89</sup> Nevertheless, other restrictions governing these programs do apply.<sup>90</sup>

Certain additional restrictions apply to Army Legal Assistance Program volunteers. Generally, they may not be com-

<sup>78</sup> AR 27-3, *supra* note 1, para. 4-3a. The provision of legal assistance has not always been recognized as an official function. *See, e.g.*, AR 600-103 (1951), *supra* note 21, para. 10d (legal assistance provided by a military officer was understood to be given in the officer’s “individual capacity as a lawyer, and that his acts in rendering the service are not to be construed as the official acts of an officer or agent of the Department of the Army”).

<sup>79</sup> AR 27-3, *supra* note 1, para. 4-3b, c.

<sup>80</sup> The Federal Tort Claims Act, 28 U.S.C. § 2679 (1988), provides a basis for federal liability when an employee acting within the scope of employment negligently injures a third-party civilian.

<sup>81</sup> *See* 28 C.F.R. § 50.15 (1992).

<sup>82</sup> *See* 10 U.S.C. § 1054(f); DEP’T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 3-21 (28 Feb. 1990) [hereinafter AR 27-20].

<sup>83</sup> *See* AR 27-3, *supra* note 1, paras. 2-2, 2-5, 3-5, 3-6, 3-7, 3-8, 4-3, 4-7 (bright-line rule); AR 27-26, *supra* note 43, app. B, rule 1-5.

<sup>84</sup> AR 27-3, *supra* note 1, para. 4-3e.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* para. 4-3e(1); *see also* I.R.C. § 7705; Treas. Reg. § 301.7701-15 (as amended in 1980).

<sup>87</sup> AR 27-3, *supra* note 1, para. 4-3e(2); *see also* 10 U.S.C. § 1588(b); DEP’T OF ARMY, REG. 608-1, ARMY COMMUNITY SERVICE PROGRAM, para. 4-2 (27 Apr. 88) [hereinafter AR 608-1].

<sup>88</sup> AR 27-3, *supra* note 1, para. 4-3e(3); *see also* 5 U.S.C. § 3111.

<sup>89</sup> Because electronic income tax filing programs are licensed to Army legal offices and purchased with Army funds, client eligibility for this legal assistance service is governed by AR 27-3, *supra* note 1, para. 2-5.

<sup>90</sup> *See* AR 608-1, *supra* note 87, para. 1-7 (generally limiting ACS services to military members on active duty, retired service members, DA employees, and their families); and I.R.S. Pub. 678 (Nov. 1992) (indicating that the VITA program provides free tax assistance to military members, people with basic tax returns, and persons with disabilities or special needs).

pensated<sup>91</sup> and must work under the direct supervision of an employee (including an officer or enlisted soldier), or under the direct supervision of another volunteer whose services are supervised directly by such an employee. A clear statement should be provided to the volunteer on the scope of his or her duties and on the importance of protecting the confidentiality of attorney-client communications.<sup>92</sup>

When student volunteers support legal assistance programs in or outside the United States, each volunteer "must be enrolled full-time in a junior college, college, university, law school, or comparable recognized institution,"<sup>93</sup> and the student's work in the legal office must be part of an established program between the legal office and the student's school "that is designed to provide educational experiences for students."<sup>94</sup> Additionally, student volunteers may not be used to displace any employee,<sup>95</sup> and may not have access to any record protected by the Privacy Act<sup>96</sup> without the client's consent.<sup>97</sup>

The list of legal assistance providers does not include civilian attorney volunteers. This omission is deliberate. Most civilian lawyers will not provide voluntary services to the Army unless they can be assured of personal liability protection from the federal government in the event of a legal malpractice claim.<sup>98</sup> Not only can this assurance not be provided, but also, in almost all instances, the Army legally cannot even accept the voluntary or gratuitous services of civilian lawyers for legal work they might perform in a legal office.<sup>99</sup> The only possible exception to this prohibition is in the area of tax assistance services. In this area, the Army can accept the voluntary services of civilian lawyers and others through the IRS VITA program and ACS's tax assistance program.<sup>100</sup>

## X. Legal Assistance Clients

No one has a right to legal assistance. Neither statute nor Army regulation create such a right.<sup>101</sup> AR 27-3 merely indi-

<sup>91</sup> Volunteers working for ACS, however, may be reimbursed for incidental expenses. See AR 27-3, *supra* note 1, para. 4-3e(2)(c); see also DEP'T OF ARMY, REG. 215-1, THE ADMINISTRATION OF ARMY MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES, para. 3-14j (10 Oct. 1990) [hereinafter AR 215-1].

<sup>92</sup> AR 27-3, *supra* note 1, para. 4-3e.

<sup>93</sup> *Id.* para. 4-3e(3)(b). This regulatory provision is more restrictive than the governing statute. Compare *id.* with 5 U.S.C. § 3111(a) (authorizing "not less than half-time" students, including those enrolled in "high school, trade school, and vocational or technical institutes" to provide voluntary services to the federal government). Because of concerns about the maturity of younger students and the need to protect fully the confidentiality of attorney-client communications, AR 27-3 is not as expansive as the statute. Outside the Army Legal Assistance Program, this regulatory restriction does not apply.

<sup>94</sup> AR 27-3, *supra* note 1, para. 4-3e(3)(c). Army legal offices have used law student volunteers to provide in-court representation to legal assistance clients in jurisdictions in which law students are allowed, by court rule, to appear under the supervision of a licensed attorney.

<sup>95</sup> *Id.* para. 4-3e(3)(d).

<sup>96</sup> 10 U.S.C. § 275.

<sup>97</sup> AR 27-3, *supra* note 1, para. 4-3e(3)(e).

<sup>98</sup> See, e.g., The Federal Tort Claims Act, 28 U.S.C. § 2679 (1988). Attorneys who provide voluntary services to the Army should be distinguished from civilian lawyers in private practice who, on occasion, provide *pro bono* or "no-fee" legal services to clients who are eligible for legal assistance. Members of the latter category actually are not legal assistance providers; rather, they are providing voluntary services to clients—not to the Army. If a client were to assert a malpractice claim, these lawyers presumably would be covered by their commercial malpractice insurance policies. See AR 27-3, *supra* note 1, para. 3-7h(8).

<sup>99</sup> See 10 U.S.C. § 1588(b) (providing, "Notwithstanding section 1342 of title 31, [the military departments] may accept from any person voluntary services to be provided for a museum, a natural resource program, or a family support program" and that these volunteers are to be treated as federal employees for the purposes of the FTCA). A "family support program," however, does not include a legal assistance program. The OSD and the Army take the position that the term "family support program" has a limited meaning—one limited to programs reasonably analogous to the Navy Family Service Center—such as ACS—and the Navy Ombudsman program—such as Army support groups and installation mayoral programs. See Op. Admin. L. Div., Off. JAG, Army, DAJA-AL/1087 (5 Feb. 1987); AR 608-1, *supra* note 83, para. 4-2. The FTCA does not apply overseas. The Army, however, takes the position that although the Military Claims Act (MCA), 10 U.S.C. § 2723 (1988), does not address volunteers specifically, the MCA would cover volunteers overseas. See Op. Admin. L. Div., Off. JAG, Army, DAJA-AL/2354 (3 Oct. 1988). Army activities that do not come within the scope of 10 U.S.C. § 1588 may be able to use volunteers if they execute gratuitous service agreements. Nevertheless, individuals who provide gratuitous services—that is, services provided that are freely and expressly given to the federal government without any expectation of remuneration of any type—are not treated as federal employees for the purposes of the FTCA or the MCA. The absence of liability protection for civilian lawyers under the FTCA and the MCA is only one issue. The real issue is whether the voluntary or gratuitous services of an attorney can be accepted in the first place. In the absence of specific legal authority, see, e.g., 15 U.S.C. § 1588 (1988), 31 U.S.C. § 1342 prohibits federal agencies from accepting voluntary services. Moreover, gratuitous services can be accepted "only when [pay] for the duties to be performed is not fixed by law or when the law permits the acceptance of service without compensation." OFFICE OF PERSONNEL MANAGEMENT, FEDERAL PERSONNEL MANUAL, chap. 300, subch. 4 (Mar. 31, 1989). This precludes the Army from accepting most gratuitous services, including legal, paralegal, and legal secretarial services. See Letter, Admin. L. Div., Office of The Judge Advocate General, U.S. Army, DAJA-AL/1869, subject: Acceptance of Voluntary Services in Legal Offices (24 May 1990); see also AR 215-1, *supra* note 85, para. 3-14f (related material on the acceptance of gratuitous services in the Army).

<sup>100</sup> AR 27-3, *supra* note 1, para. 4-3e(1), (2). For example, an ACS or VITA volunteer who also is an attorney could provide tax assistance in or outside of a legal office. Presumably, while working in the legal office, the ACS or VITA volunteer would be under the supervision of another attorney, and the volunteer's work would be limited to tax assistance. The volunteer's performing any other legal work would require an exception to AR 27-3—an exception not likely to be granted unless the OSD and Army change their official interpretations of 10 U.S.C. § 1588(b).

<sup>101</sup> See *supra* notes 30-32 and accompanying text (discussing 10 U.S.C. § 1044). This statute indicates that "[s]ubject to the availability of legal staff resources, the Secretary concerned may provide legal assistance . . ." 10 U.S.C. § 1044 (emphasis added). This statute does not create any right to legal assistance. See AR 27-3, *supra* note 1, para. 1-1.

cates which persons are eligible to receive legal assistance and the limitations on the assistance that may be provided. Those persons, and the applicable limitations, are summarized as follows:

(1) Service members in the AC, as well as their family members.

(2) Service members in the RC, as well as their family members, when the service member is serving on active duty. (Supervising attorneys may limit legal assistance to emergencies or to certain categories of cases based on availability of expertise or resources when RC soldiers are serving on active duty for twenty-nine days or less).

(3) All other RC service members, subject to the following limitations:

(a) From RC judge advocates: legal assistance is limited to RC service members on personal legal problems and needs that may adversely affect readiness or that have arisen from or have been aggravated by military service, including military administrative matters. (RC supervising attorneys may limit legal assistance to emergencies or to certain types of cases based on the availability of expertise or resources).

(b) From AC and RC legal offices: Premobilization legal preparation (PLP) for RC service members and their family members. (PLP includes legal counseling and the drafting and execution of wills and powers of attorney in preparation for mobilization).

(4) AC and RC service members, as well as their family members, when the service member is receiving military retirement or disability pay.

(5) Surviving family members of AC, RC, and retired service members who would be eligible for legal assistance if the service or retired member were alive.

(6) Civilian employees of the DOD, including DA employees:

(a) Against whom pecuniary liability has been recommended with regard to presenting matters in rebuttal to, or on appeal from, such charges.

(b) Who are serving with the Armed Forces of the United States in a foreign country. (Family members who accom-

pany them also may receive legal assistance).

(7) Civilian employees of the DA and their family members subject to the following limitations:

(a) Employees, and their family members who will accompany or have accompanied them, when the employee has accepted overseas employment or already is on such duty and has returned to the continental United States on home leave. (Legal assistance is limited, as determined by the supervising attorney, to matters that relate to processing for overseas employment or, for an employee on home leave, to help with an ongoing legal assistance matter being handled overseas).

(b) Employees and their family members, when the employee works in the United States, its possessions, or territories, and is classified as a "mission-essential" or "emergency-essential" civilian personnel, and has been notified that he or she is being deployed. (Legal assistance is limited to matters, as determined by the supervising attorney, that relate to deployment. Legal assistance is authorized for employees and family members for a reasonable period after the employee returns from deployment to close out ongoing legal assistance matters that arose before or during deployment).

(8) Primary next of kin (PNOK), executors, personal representatives, administrators, and legally recognized estate representatives for matters relating to the settlement of estates of the following:

(a) AC or RC soldiers who die while in a military duty status.

(b) United States citizens and nationals who are civilian employees of the DOD and who are serving with or accompanying United States Armed Forces outside the United States at the time of their deaths.

(9) Fiduciaries, including those who hold powers of attorney, who have been appointed by those listed below to manage their property or handle their personnel affairs. (Legal services are limited to matters that would otherwise be within the scope of the legal assistance program if the grantor were present):

(a) AC or RC soldiers who are serving in a combat zone.

(b) United States citizens and nationals who are civilian employees of the DOD and who are serving with or accompanying United States Armed Forces in a combat zone.

(10) Members of other military forces, and their family members who accompany them, when the service member is serving in the United States.

(11) Prisoners who, although discharged from military service, still remain confined within a United States military confinement facility.<sup>102</sup>

The new regulation makes several changes to the list of eligible clients. Most of these changes represent "carry-overs" from the exceptions that were made to the previous legal assistance regulation during and following the war with Iraq.<sup>103</sup> Legal assistance has been expanded significantly in the Reserves.<sup>104</sup> Other changes in client eligibility extended limited legal assistance to DA civilian employees classified "mission-essential" (upon notification that they are being deployed) on legal needs (as well as those of their family members) relating to their deployment.<sup>105</sup> Legal assistance also is extended to the PNOK, including parents of soldiers, and of DOD civilian employees who die outside the United States, on matters relating to the settlement of estates.<sup>106</sup>

Legal assistance also is extended for the first time to those possessing powers of attorney to manage the personal affairs of AC and RC soldiers and DOD civilian employees serving in combat zones. Legal assistance in these cases is limited to "matters that would otherwise be within the scope of the legal assistance program if the grantor were present."<sup>107</sup>

Nevertheless, legal assistance is not authorized for civilian contractors—that is, persons not otherwise authorized legal assistance under AR 27-3 who work for persons or firms having a contract with the DOD. The previous legal assistance regulation was unclear on this point. Although no statute restricts judge advocates from providing legal assistance to civilian contractors or their family members, it should be authorized only if it has a military purpose. Supervising attorneys must conserve their limited legal resources. They may, however, authorize a temporary variation from AR 27-3—or a commander may seek a permanent exception to AR 27-3—to provide legal assistance to civilian contractors.<sup>108</sup>

## XI. Scope of Legal Assistance

### A. General

Legal assistance is provided in two ways: by meeting the needs of potential clients "for help and information on legal matters," and by helping individual clients resolve "their personal legal problems whenever possible."<sup>109</sup> The former is a preventive law effort and the latter consists of client services.

Legal assistance is defined as "legal advice, counseling, and other help and information provided to eligible clients on their

<sup>102</sup> AR 27-3, *supra* note 1, para. 2-5; glossary (for definitions of emergency-essential and mission-essential civilian employees, family members, military administrative matters, and PLP).

<sup>103</sup> See Message (27 Feb. 1991), *supra* note 50; Message (5 Mar. 1991), *supra* note 50.

<sup>104</sup> See *infra* notes 155-191 and accompanying text.

<sup>105</sup> AR 27-3, *supra* note 1, para. 2-5a(7)(b); *id.* glossary. These are employees who are designated by SJAs as "mission-essential" "to ensure the success of a combat operation or to support combat essential systems," but whose positions have not yet formally been designated by their managers or supervisors as "emergency-essential." See *id.*

<sup>106</sup> AR 27-3, *supra* note 1, para. 2-5a(8); see DEP'T OF ARMY, REG. 600-8-1, PERSONNEL—GENERAL: ARMY CASUALTY AND MEMORIAL AFFAIRS AND LINE OF DUTY INVESTIGATIONS, para. 3-7 (18 Sept. 1986) (defining PNOK to include parents, in the absence of a spouse or child) [hereinafter AR 600-8-1]; AR 27-3 (1989), *supra* note 3, para. 2-4a(5), did not authorize legal assistance to a parent who was the PNOK of a soldier unless the parent was a dependent of the soldier; nor did it authorize legal assistance to the PNOK of a civilian employee under any circumstances. During and following the war with Iraq, legal assistance was extended to the PNOK—including surviving parents—of soldiers. This assistance covered probating of estates and appointing guardians for minor children, including in-court representation, without regard to the financial hardship of the represented party. See Message (27 Feb. 1991), *supra* note 50; Message (5 Mar. 1991), *supra* note 50. Although the Gulf War effectively was over by the end of February 1991, military and political leaders were uncertain over whether the war might resume. The Army continued to provide legal assistance after the war to the PNOKs of the 213 soldiers who died from all causes during Desert Storm.

<sup>107</sup> AR 27-3, *supra* note 1, para. 2-5a(9).

<sup>108</sup> See *id.* at 1 (Proponency and Exceptions); *id.* paras. 1-4g(3), 1-5; cf. AR 27-3 (1989), *supra* note 3, para. 2-4a(8)(a), (c); DSAT Report, *supra* note 6, issue 35; see also Message, Headquarters, Dep't of Army, DAJA-LA, subject: The Provision of Legal Assistance Services to Civilian Contractors (281200Z Dec. 92). The Commander, U.S. Army Space and Strategic Defense Command, recently requested TJAG to grant an exception, pursuant to AR 27-3, allowing the legal office at Kwajalein Atoll to provide legal assistance to civilian contractors and their dependents. Because of Kwajalein Atoll's remote location (2100 miles southeast of Hawaii) and its limited communication facilities, TJAG approved this request. Legal assistance is to be provided on a space available basis, and is limited to ministerial services; legal counseling, including reviewing and discussing legal correspondence and legal documents; preparing powers of attorney; and assisting clients in retaining civilian counsel. Memorandum, Office of The Judge Advocate General, U.S. Army, DAJA-LA, subject: Request for Exception to AR 27-3, The Army Legal Assistance Program (24 Feb. 1993).

<sup>109</sup> *Id.* para. 2-1a.

personal legal affairs" pursuant to AR 27-3. A client's personal legal affairs are defined as "legal matters of an individual for which legal assistance may be provided" pursuant to AR 27-3.<sup>110</sup> Together, these apparently circuitous definitions mean that if a particular legal service for an individual on a particular legal problem is authorized specifically under AR 27-3, then it is legal assistance.<sup>111</sup> In drafting AR 27-3, an effort was made to address, or at least list, every possible legal assistance case or service. Given the need to maintain some flexibility in the legal assistance program, however, this listing is not exclusive. Any other kind of legal-assistance-type service not listed may be provided when a supervising attorney determines that "available resources, personnel, and expertise are sufficient to provide the assistance needed."<sup>112</sup>

The scope of the Army Legal Assistance Program is defined by its preventive law and client service components. A particular preventive law effort is within the scope of the legal assistance program if it addresses the needs of those in the military community for help and information on their personal legal affairs.<sup>113</sup> Otherwise, the particular legal service will be no more than a matter of statistical consequence<sup>114</sup> because whatever preventive law information is being disseminated probably will fall within some other area of legal practice in the Army—for example, claims, military justice, or administrative law. That preventive law efforts may benefit persons other than authorized legal assistance clients also is, as a practical matter, beyond regulatory control in most instances.

On the other hand, whether a particular client service is authorized under AR 27-3 is a matter of importance because AR 27-3 contains not only authorizations, but also certain limitations and outright prohibitions on the type of cases that may be handled, and the type of legal services that may be provided,

under the legal assistance program.<sup>115</sup> Furthermore, only eligible legal assistance clients may be assisted.

Under AR 27-3, commanders and supervising attorneys also have authority—on their own or with TJAG's approval—to limit legal assistance to certain categories of clients or to certain types of cases or services.<sup>116</sup> Therefore, an attorney providing legal assistance must be aware, not only of the provisions of AR 27-3 in these areas, but also of the manner in which his or her supervising attorney has exercised authority in these areas.

Another consideration affecting the scope of legal assistance is the competence of the individual legal assistance attorney. A lawyer is duty-bound not to represent a client "whose needs exceed either the lawyer's competence or authority to act in the client's behalf."<sup>117</sup> Legal assistance attorneys assist clients from all states, as well as from other jurisdictions and nations, on all types of personal legal matters. These matters can be handled properly only if these lawyers are provided with continuing legal education that will allow them to achieve and maintain the required proficiency to provide expansive legal services.

#### B. "Fee" and "No-fee" Cases

AR 27-3 makes a distinction between cases in which a client is paying a fee for professional services<sup>118</sup> and those in which the client is not paying a fee. "No-fee" cases are within the scope of the legal assistance program if all other requirements of AR 27-3 are met, but "fee" cases are not.<sup>119</sup> The primary reason for this distinction is clearly to separate the legal assistance clients of RC judge advocates<sup>120</sup> from clients they, or their firms, assist on a commercial basis.

<sup>110</sup>*Id.* glossary.

<sup>111</sup>The only exception is military administrative cases handled by USATDS attorneys. These cases are considered USATDS cases if handled by USATDS attorneys, and legal assistance cases if handled by non-USATDS attorneys. See *id.* para. 3-6g(3); *id.* app. B-2(4); see also, AR 27-1, *supra* note 72, para. 2-5b; DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, ch. 6 (22 Dec. 1989) [hereinafter AR 27-10].

<sup>112</sup>AR 27-3, *supra* note 1, para. 3-5c(1).

<sup>113</sup>*Id.* para. 2-1a(1).

<sup>114</sup>Statistics are collected on preventive law legal assistance classes, articles, and booklets. *Id.* app. B-4c(1).

<sup>115</sup>*Id.* paras. 3-5a, 3-5b, 3-8a.

<sup>116</sup>*Id.* paras. 1-4, 1-5, 2-5a, 3-5c.

<sup>117</sup>AR 27-26, *supra* note 43, app. B, rule 1.1 (comment).

<sup>118</sup>This would include cases that a lawyer is handling on a "reduced-fee" as opposed to a "no-fee" basis. A "fee" includes the charge for professional services, but not the payment for, or reimbursement of, court costs and administrative filing fees. See AR 27-3, *supra* note 1, glossary.

<sup>119</sup>*Id.* para. 3-5b. For example, an RC judge advocate may, in an appropriate case, meet the *pro bono* requirements of his or her state bar and still earn retirement points for providing legal advice or help on a no-fee basis to an eligible legal assistance client. The receipt of "double credit" is a matter of state, not federal, concern. This practice should be encouraged because it benefits legal assistance clients.

<sup>120</sup>Judge advocates in the AC and most civilian attorneys also may assist clients on a commercial basis, with TJAG approval. See AR 27-1, *supra* note 72, para. 4-3e,f; see also AR 27-3, *supra* note 1, para. 4-7a, d. The new AR 27-3 prohibits both AC and RC attorneys from requesting or accepting "any benefit or gratuity . . . from any source as payment for performing official duties." AR 27-3, *supra* note 1, para. 4-7.



A second reason for this distinction is to avoid duplicating or interfering with the legal services that have been provided when a client already has retained civilian counsel. One concern in this area is to conserve limited legal assistance resources.<sup>121</sup> Another concern is to discourage a client's use of a legal assistance attorney's time to obtain a "second opinion."<sup>122</sup>

Finally, AR 27-3 is a legal assistance regulation, and other activities not authorized or addressed in AR 27-3 are not necessarily prohibited. For example, an Army attorney may help a civilian lawyer—or other person not authorized legal assistance—with the translation of a letter from German into English, assist on an issue of military law,<sup>123</sup> or provide notary service<sup>124</sup> when doing so does not interfere with official business and serves a military purpose. The new AR 27-3 does not authorize these because they are not legal assistance. They are not prohibited and such gestures on the part of judge advocates promote good relations with the public, as well as with fellow lawyers in private practice.

### C. Specific Limitations

AR 27-3 revises, consolidates, updates, and—in one instance regarding claims against the United States—corrects the limitations on the scope of legal assistance from the previous regulation. The previous regulation specifically prohibited or limited legal assistance in the following areas: civilian and military criminal matters, claims and potential litigation against the United States, and private income-producing business activities. In addition, the regulation prohibited providing military administrative law opinions on behalf of clients, representing clients in court against the United States, and assisting clients in "fee-generating and prepaid representation cases."<sup>125</sup>

AR 27-3 divides all limitations on legal assistance services between those in which no legal advice or assistance may be provided, and those in which only limited legal advice or guidance may be provided as specified.<sup>126</sup> These are summarized below as follows:

(1) The following are not considered or counted as legal assistance cases and no legal advice or assistance, other than referral to civilian lawyers or providing lists of lawyers, may be provided:

(a) Military justice matters.<sup>127</sup>

(b) Private business activities.

(c) Civil litigation against the United States.

(2) The following are considered as legal assistance cases and attorney-client relationships may be formed, when appropriate, but legal assistance is limited, as specified, to certain legal advice and guidance, and to referral to civilian lawyers or providing lists of lawyers:

(a) Claims or civil lawsuits against the United States. Legal assistance is limited to general guidance on administrative or legal procedures and filing requirements.

(b) Contingent legal fee cases. Legal assistance is limited to general advice on these lawsuits, court procedures, fil-

<sup>121</sup> See also AR 27-3, *supra* note 1, para. 3-8b(3) (discussing prepaid legal services).

<sup>122</sup> Although not specifically prohibited from doing so, a legal assistance attorney should be hesitant to advise a person represented by another lawyer. Differences of opinion on a particular case, or on the manner in which it is being handled, should be discussed between attorneys directly—not through a client as an intermediary.

<sup>123</sup> For example, a judge advocate may advise a civilian lawyer who represents soldiers in domestic relations matters on the amount of financial support to family members required by the Army. See DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (22 May 1987) [hereinafter AR 608-99]. A judge advocate also may advise a civilian practitioner on the enforceability of court orders and other matters within his or her area of military or legal expertise.

<sup>124</sup> Although AR 27-3 addresses the provision of notary services, the regulation does not intend that these ministerial services constitute legal assistance. Although they often complement the provision of legal assistance services, notary services may be provided outside an Army legal office, elsewhere on the installation, if in accord with law and regulation. See also DEP'T OF ARMY, REG. 600-11, NOTARIAL ACTS (18 June 1990), also published as DEP'T OF AIR FORCE, REG. 110-6 (no restrictions on eligibility for notary services except federal and state requirements).

<sup>125</sup> AR 27-3 (1989), *supra* note 3, para. 2-8, 2-9b(1)(d), 2-9b(1)(e). A judge advocate who, on behalf of an SJA, drafts or signs an administrative law opinion—such as an official interpretation of an Army regulation—that supports the legal position of one of his or her legal assistance clients, is involved in a clear conflict of interest. The new AR 27-3 does not restate this prohibition because it already is addressed adequately in the rules of professional responsibility. See AR 27-26, *supra* note 43, app. B, rules 1.7, 1.13.

<sup>126</sup> AR 27-3, *supra* note 1, para. 3-8.

<sup>127</sup> Advice or assistance in these cases must be provided by judge advocates assigned to USATDS, and other judge advocates made available by their supervisors to handle such cases or particular cases. *Id.* para. 3-6g(3), app. B-2(4); see also AR 27-1, *supra* note 72, para. 2-5b (discussing duties and responsibilities of judge advocates assigned as defense counsel to USATDS); AR 27-10, *supra* note 111, ch. 6 (same).

ing requirements, and the potential merits of these cases.<sup>128</sup>

(c) Prepaid legal representation cases. Legal assistance is limited to general advice on these lawsuits, court procedures, filing requirements, the potential merits of these cases, and on the client's need to contact the insurance company or other organization that will pursue or defend a potential lawsuit.<sup>129</sup>

(d) Standards of conduct issues. Legal assistance may be provided on standard of conduct issues, but legal assistance attorneys will refer clients to the Ethics Counselor for the "agency position concerning post-employment, honoraria, procurement integrity, and similar standard of conduct issues." Clients will be informed that "there is no attorney-client privilege or confidentiality between them and their Ethics Counselor" regarding standards of conduct matters.<sup>130</sup>

The prohibition on providing legal assistance on private business activities includes any legal help on "personal and commercial business activities intended to result in economic

gain."<sup>131</sup> This prohibition means that legal assistance attorneys may not assist clients on legal matters pertaining to civilian employment—regardless of whether they work for the government, a private business, or themselves.<sup>132</sup> Additionally, clients may not receive assistance on business investments and other such transactions. Clients, however, may be provided legal assistance on matters relating to the rental or sale of "principal residences," which, as defined in AR 27-3, includes family residences that the client currently occupies; seeks to occupy; or once occupied, but no longer occupies because of military orders.<sup>133</sup>

The distinction between "litigation against the United States," when legal assistance is prohibited, and "claims or civil lawsuits against the United States," when limited assistance is allowed, is based on whether or not a lawsuit has been filed. "Litigation against the United States" includes any civil lawsuit in which the United States has an interest. Advising a client concerning such a case requires a supervising attorney's approval;<sup>134</sup> in-court representation would require TJAG approval.<sup>135</sup> On the other hand, legal assistance attorneys still may provide advice to—and supervising attorneys may authorize in-court representation for—clients involved in the following types of lawsuits, even though they typically are prosecuted in the name of the United States: noncriminal federal income tax matters, bankruptcy proceedings, or civil and criminal matters brought before a United States magistrate on a military installation.<sup>136</sup> When an individual seeks "to file a

<sup>128</sup> A contingent fee case is defined as:

[t]he type of case (excluding those involving the reemployment rights of veterans under State or Federal law) where the fee for professional legal services charged by civilian lawyers customarily is dependent upon the successful outcome of the case and agreed to be a percentage of the client's recovery (e.g., actions in tort, such as personal injury, wrongful death, or property damage).

AR 27-3, *supra* note 1, glossary (emphasis added). If the case is not "profitable" enough for a civilian lawyer to take on a contingent-fee basis because of the small amount involved, then this limitation on a legal assistance attorney's involvement does not apply.

<sup>129</sup> One example includes a tort case in which an insurance company contractually is required to provide legal representation. Prepaid legal representation cases also include requests to prepare amended tax returns to correct erroneous returns prepared by commercial tax preparers when such follow-on work is included as part of the initial fee arrangements with customers.

<sup>130</sup> See *United States v. Schaltenbrand*, 930 F.2d 1554 (11th Cir. 1991). In *Schaltenbrand*, the court held that a conversation in an Air Force legal assistance office between an Air Force Reserve officer and two judge advocates serving as deputy standards of conduct counselors for the Air Force was privileged. The case, however, highlights the problems of using such counselors as legal assistance attorneys. In *Schaltenbrand*, the "client" filled out a form that notified him that any disclosure he made was "privileged" and could not be disclosed to anyone without his consent. The same form was used for the legal assistance program and the standards of conduct program. The "client" also received legal advice from one of the attorneys on the information he disclosed, although the attorney claimed he told the "client" that he could not "represent" him. The court held that a finding of no privilege "would inhibit other members of the Air Force from seeking the advice of JAG attorneys in order to avoid conflicts of interest." This type of problem can be avoided by designating ethics counselors whose routine duties do not involve assisting clients, and whose duties are performed in locations clearly separated from offices that assist these clients.

<sup>131</sup> AR 27-3, *supra* note 1, glossary; *id.* para. 3-6e(3).

<sup>132</sup> For example, legal assistance may not be provided to family child care (FCC) providers on contractual disputes with the parents of the children for whom they provide care, or on the preparation of income tax schedules reporting their income from their child care businesses. DEP'T OF ARMY, REG. 608-10, PERSONAL AFFAIRS: CHILD DEVELOPMENT SERVICES, para. 3-2, chap. 6 (12 Feb. 1990) (defining FCC providers). Parents who are eligible legal assistance clients, however, could be provided legal help on such disputes. The prohibition against helping FCC providers should not be read too broadly. FCC providers may be provided IRS income tax schedules or instructions to report income from their business activities, and their income tax returns may be filed electronically in a legal assistance office.

<sup>133</sup> AR 27-3, *supra* note 1, glossary.

<sup>134</sup> *Id.* para. 3-8a.

<sup>135</sup> *Id.* para. 3-8a(3)(b).

<sup>136</sup> *Id.* para. 3-8a(3).

claim or civil lawsuit against the United States," legal assistance is "limited to general advice on administrative or legal procedures and filing requirements, and on the client's need to retain a civilian lawyer in order to obtain further legal advice or assistance."<sup>137</sup>

#### D. Local Limitations

In the aftermath of the Cold War, efforts are underway to decrease the size of the Armed Forces. AR 27-3 was drafted with this in mind.<sup>138</sup> A commander who has a legal assistance program effectively can eliminate the program by abolishing all the positions that staff the program. More likely, however, personnel cuts—when and if they occur in an existing program—will be piecemeal in nature.

Where a legal assistance program exists, a commander has great latitude in defining its scope. AR 27-3 distinguishes between legal assistance cases and services that *must* be provided and those that *may* be provided.<sup>139</sup> The distinction between required and optional cases and services is designed

to foster consistency, while allowing for flexibility in legal assistance programs from one Army installation to another.<sup>140</sup>

AR 27-3 provides maximum flexibility to commanders and SJAs by allowing them to structure their legal assistance programs in light of local conditions, and available resources and expertise. When some, but not all of the resources are cut from an existing legal assistance program, both an AC commander and a supervising attorney have the authority to eliminate all "optional" legal assistance "cases," such as adoptions and civilian criminal matters, and "optional" legal assistance "services," such as electronic income tax filing and *pro se* assistance.<sup>141</sup> If legal assistance services need to be limited further, then a supervising attorney may request that the commander authorize that legal assistance be denied to certain categories of eligible clients, such as military retirees.<sup>142</sup> A commander may authorize that all or some legal assistance services be denied to certain eligible clients even while "optional" legal assistance services continue to be provided to other eligible clients.<sup>143</sup>

In addition, to foster some degree of consistency between various legal assistance programs, AR 27-3 divides legal assis-

<sup>137</sup>*Id.* para. 3-8b(1); cf. AR 27-3 (1989), *supra* note 3, para. 2-8b(2) (allowing legal assistance attorneys to advise clients "on whether to accept an award, request reconsideration, or file an appeal" in claims that provided exclusive administrative remedies, such as the Foreign Claims Act). 10 U.S.C. § 2734 (1988); AR 27-20, *supra* note 82, chap. 10.

<sup>138</sup> Personnel at HQDA currently have no plan to limit the scope of legal assistance services. The new AR 27-3 represents the present Army policy, and the provisions of the regulation that cover the authorized scope of legal assistance services are more expansive than prior legal assistance regulations. Nothing presently suggests that the JAGC will suffer disproportionate personnel cuts relative to the rest of the Army. Although the deactivation of Army installations and military units will result in the loss of judge advocate positions authorized for those commands, these cuts should have no effect on the commands that remain. Nevertheless, legal assistance services naturally will have to compete with other activities in each command to get its fair share of the available resources such as money, and military and civilian personnel authorizations. Likewise, because of limitations on hiring, offices also may have to compete for the authority to fill vacant civilian positions.

<sup>139</sup> AR 27-3, *supra* note 1, para. 2-6a, allows commanders to limit legal assistance services "when space, facilities, or legal or supporting staff are unavailable." RC commanders may limit legal assistance services and client eligibility in any manner required by the resources available. AC commanders may limit legal assistance services to those types of legal cases and services indicated as required under paragraphs 3-6 and 3-7, and may deny legal assistance services to clients otherwise eligible as indicated in paragraph 2-6a(1). Even when a case, service, or client otherwise requires legal assistance, an AC commander may request further authority from TJAG to limit or deny legal assistance. See *id.* paras. 1-5, 2-6c. In addition, a supervising attorney may authorize a temporary variation from policies and procedures "when necessary to ensure effective legal assistance services." In these instances, the Chief, Legal Assistance Division, OTJAG, must be notified by memorandum. See *id.* para. 1-4g(3).

<sup>140</sup> This distinction between required and optional services is not without its downside. By setting priorities, offices arguably run the risk of losing resources for legal services that are not deemed to be required. The commanders who control those resources, however, often are the beneficiaries of those legal assistance services—whether required or optional. Accordingly, the decision on which resources to cut actually is more dependent on the value of those services than on the provisions of AR 27-3.

<sup>141</sup> See *id.* paras. 1-4g(2)(b), 3-5c, 3-6a, 3-6j, 3-7f(1), 3-7f(2).

<sup>142</sup> An AC commander, on his or her own authority, may deny legal assistance services to RC soldiers serving on active duty for less than 30 days and their family members. *Id.* para. 2-6a(1). An AC commander also may deny these services to AC and RC military retirees and their family members; surviving family members of AC, RC, and retired military personnel; and all DOD civilian employees serving in a foreign country and the family members who accompany them. *Id.* The basis for providing AC commanders with this denial authority is the same as the one for distinguishing between "required" and "optional" legal assistance clients and services. See *infra* notes 192-199 and accompanying text. Where a legal assistance program exists, however, an AC commander does not have the authority to deny legal services to civilian employees on reports of survey, see DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY, para. 13-38a (31 Jan. 1992). Nor may such a commander deny legal services to "mission-essential" or "emergency-essential" employees and their families on legal assistance matters relating to deployment. On the other hand, an AC commander may deny legal assistance services to the PNOKs of DOD civilian employees while serving outside the United States. See AR 600-8-1, *supra* note 106, para. 3-7a (defining PNOK). In addition, an RC commander has complete discretion in deciding which, if any, legal services authorized under AR 27-3 will be provided and the eligible clients who will receive those services. See AR 27-3, *supra* note 1, para. 2-6a(2).

<sup>143</sup> See AR 27-3, *supra* note 1, para. 1-1a (providing explicitly that the regulation does not create a right or benefit on the part of anyone to receive legal assistance).

tance services and cases between those that are "required" and those that are "optional." AR 27-3 allows SJAs to request exceptions<sup>144</sup> or to authorize temporary variations<sup>145</sup> when available resources or expertise do not allow legal assistance in "required" areas.

The type of legal service rendered in any particular case may be limited further by the time or resources available to the legal assistance attorney, as well as by restrictions placed upon the attorney by AR 27-3, or by his or her supervising attorney. When limitations caused by lack of expertise, time, or resources exist, a legal assistance attorney still is expected to assist the client by providing initial advice, if possible,<sup>146</sup> and by making a referral to another Army lawyer or civilian lawyer,<sup>147</sup> or by providing a list of civilian lawyers who can handle the type of case at hand.

All SJAs who have legal assistance programs are expected to establish and publish new policy letters that fully implement AR 27-3.<sup>148</sup> The policy letter should address who has the authority in the legal office to carry out the responsibilities and make the related decisions on all legal assistance matters. The responsibilities related to these decisions are listed at Appendix A of this article and are broken down into three areas: those relating to the commander, management, and client services. As to client services, the policy letter also should address which "optional" legal assistance "cases" may be handled by attorneys and which "optional" legal "services" may be provided. The policy letter, which either the SJA or commander may sign, should indicate specifically who may authorize exceptions to policy. All "required" and "optional" legal assistance cases and services under AR 27-3 are listed at Appendix B of this article which also lists those cases and services outside the scope of legal assistance.

The new AR 27-3 contains the following new provision:

Legal assistance will not be denied or delayed on the basis of the command, installation, or military department to which a client is assigned or with which a client is affiliated. However, a commander may deny certain legal assistance services, or legal assistance in certain cases, to eligible clients who are assigned to, or affiliated with, another military department that does not routinely provide such legal assistance services, or legal assistance in such cases.<sup>149</sup>

The first sentence of this provision is designed to prevent Army legal offices from discriminating against soldiers assigned to other Army commands or installations, or their family members, as well as against those assigned or affiliated with other military departments. Army legal offices often are tempted to favor their own soldiers over those assigned elsewhere when scheduling or providing legal assistance. This discriminatory practice specifically is prohibited unless an exception has been granted pursuant to AR 27-3.<sup>150</sup>

The military services traditionally have extended legal assistance services to all eligible clients, regardless of the military service to which they are assigned or affiliated—a tradition that is continued in AR 27-3.<sup>151</sup> In recent years, however, this tradition has begun to place a strain on the resources of a few Army legal offices, particularly in areas where Army commands are co-located with either Air Force or Navy commands. The strain occurs when Air Force or Navy personnel refer clients to Army legal offices for legal assistance services that are not provided routinely by those military services, such

<sup>144</sup> See *id.* para. 1-5 (requiring requests for exceptions to be submitted through command channels to HQDA (DAJA-LA), Washington, DC 20310-2200). Since the publication of AR 27-3, this address has been changed to Legal Assistance Division, The Judge Advocate General, 2200 Army Pentagon, Washington, DC 20310-2200. All references to the old address in AR 27-3 should be changed to reflect this new address.

<sup>145</sup> *Id.* para. 1-4g(3) (allowing SJAs, or other supervising attorneys as appropriate, to authorize temporary variations). Temporary variations are defined as deviations from the requirements of AR 27-3 that are put into effect for less than 30 days during any one calendar year. *Id.* SJAs, however, are required to provide notice of temporary variations by memorandum to Legal Assistance Division, The Judge Advocate General, 2200 Army Pentagon, Washington, DC 20310-2200.

<sup>146</sup> See AR 27-26, *supra* note 40, app. B, rule 1.2, comment ("The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the law governing the conditions under which the lawyer's services are made available to the client").

<sup>147</sup> AR 27-3, *supra* note 1, paras. 3-7h, 3-7i.

<sup>148</sup> *Id.* para. 1-4g(1), (2).

<sup>149</sup> *Id.* para. 2-6b.

<sup>150</sup> See *id.* at 1 (Proponency and Exceptions); *id.* para. 1-5. TJAG recently authorized the Commander, Army Materiel Command (AMC) to limit legal assistance within AMC Headquarters—an office building in Alexandria, Virginia—to AC soldiers assigned to AMC Headquarters and their family members and to military retirees currently employed by AMC Headquarters. TJAG granted this exception because of the limited nature of the AMC Headquarters legal assistance program, which employs only one judge advocate on a part-time basis. In addition, legal assistance services are available at other nearby Army installations within the Washington metropolitan area. Memorandum, Office of The Judge Advocate General, U.S. Army, DAJA-LA, subject: Request for Exception to AR 27-3, The Army Legal Assistance Program (24 Feb. 1993).

<sup>151</sup> See, e.g., DEP'T OF ARMY, REG. 608-50 PERSONAL AFFAIRS: LEGAL ASSISTANCE, para. 5a (22 Aug. 1961) [hereinafter AR 608-50 (1961)]; AR 27-3, *supra* note 1, para. 2-5a, b.

as separation agreements, income tax return preparation, and electronic tax filing. Among Army lawyers, this problem is commonly known as "dumping."<sup>152</sup> Under AR 27-3, commanders now have the authority in these situations to deny such legal assistance services to those not affiliated with the Army to conserve legal assistance resources for Army clients.<sup>153</sup>

Commanders, presumably acting on behalf of supervising attorneys, also may request TJAG to grant exceptions to AR 27-3. For example, a commander might request an exception to structure or restructure a legal assistance program in light of available or limited resources.<sup>154</sup> A commander also may request authority from TJAG to deny legal assistance services to the family members of AC soldiers so that legal assistance services may be provided to all soldiers who need them.<sup>155</sup> Although this type of solution is not encouraged, it would be consistent with the four military needs, discussed earlier, that serve as the basis for the Army's legal assistance program.<sup>156</sup>

## XII. Legal Assistance in the Reserves

### A. General

AR 27-3 addresses the following types of RC judge advocates:

- (1) Those assigned to RC units, which include the following:

- (a) All ARNG judge advocates.

- (b) All USAR judge advocates who are assigned to units (*i.e.*, TPUs).

- (2) USAR judge advocates in the Individual Ready Reserve (IRR) (*i.e.*, those not assigned to RC units), including individual mobilization augmentees (IMAs).<sup>157</sup>

### B. Background

Under previous legal assistance regulations, providing legal assistance services in the Reserves was limited strictly.<sup>158</sup> Personnel assigned to the RC generally were not authorized to receive legal assistance unless they were serving on military duty. Even then, they were not extended the same legal assistance services afforded AC personnel unless they were serving on active duty for thirty days or more.<sup>159</sup> RC personnel training outside the United States, regardless of their periods of duty, could receive legal assistance on "simple wills and powers of attorney and problems relating to preparing for active duty,"<sup>160</sup> while those serving in the United States for twenty-nine days or less, and their family members, were limited to legal assistance "for emergencies only."<sup>161</sup>

RC personnel and their family members were authorized to receive PLP from RC judge advocates "at any time."<sup>162</sup> Strangely PLP was not defined as legal assistance but, nevertheless, was described to include legal counseling to soldiers

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<sup>152</sup>The author is not aware of any instance in which the situation has been the reverse—that is, an Army client being referred to an Air Force or a Navy legal office for legal assistance services that the Army did not provide.

<sup>153</sup>*Id.* para. 2-6b.

<sup>154</sup>*Id.* at 1 (Proponency and Exceptions); *see also id.* paras. 1-5, 2-6d.

<sup>155</sup>Unlike RC commanders, AC commanders do not have the authority to deny these services without requesting an exception to AR 27-3. The purpose of this procedure is threefold. First, any well-reasoned exception requires justification and consideration of alternatives. The consideration that a commander would give to the matter before he or she requests such an exception presumably results in better decisions being made on which legal assistance services will be provided and to whom. Second, this procedure, as well as other procedures required by AR 27-3, also promotes consistency among the legal assistance programs throughout the Army, thereby simplifying training requirements. Finally, TJAG needs to know the extent to which legal assistance services are being curtailed—or expanded—so that legal assistance policy, doctrine, and training can stay abreast with installation legal assistance developments. This information also allows personnel at HQDA and OTJAG to take steps to reverse unfavorable trends whenever possible. Most requests for exceptions likely will be approved.

<sup>156</sup>*See supra* text accompanying note 49; *see also infra* notes 192-199 and accompanying text.

<sup>157</sup>The IRR has no counterpart in the ARNG. With few exceptions, all ARNG judge advocates are assigned to ARNG units. All IMAs in the USAR IRR are assigned or designated to the AC, not to RC units.

<sup>158</sup>*See Legal Assistance Item, Reserve Components and Legal Assistance, ARMY LAW.*, Apr. 1989, at 62. This note discusses the provisions of AR 27-3 (1989), *supra* note 3, and various TJAG policy letters that generally prohibited RC judge advocates from providing legal assistance to RC soldiers and their families.

<sup>159</sup>AR 27-3 (1989), *supra* note 3, para. 2-4a(1), (2).

<sup>160</sup>*Id.* para. 2-4a(3)(a).

<sup>161</sup>*Id.* para. 2-4a(3)(b) and (4). During the staffing of the new AR 27-3, reviewers were unable to justify affording more legal assistance services to RC personnel stationed outside the United States than to stateside Reserve personnel. The burden on legal assistance offices overseas caused by RC units training outside the United States is fairly equivalent to the burden on legal assistance offices stateside caused by RC units training in the United States. The new AR 27-3 corrects this disparity. *See* AR 27-3, *supra* note 1, para. 2-5a(2)(b).

<sup>162</sup>AR 27-3 (1989), *supra* note 3, para. 2-4a(3).

and their families on their personal legal affairs, and legal services such as wills and powers of attorneys.<sup>163</sup>

RC judge advocates could provide legal assistance only when they were serving on active duty.<sup>164</sup> This restriction generally meant that RC judge advocates could provide legal assistance only during weekend drill periods and during their two weeks of Annual Training (AT). This restriction applied to legal assistance provided by RC judge advocates to AC soldiers and other eligible clients,<sup>165</sup> but not to PLP counseling and services provided to RC soldiers and their families.<sup>166</sup>

On the other hand, RC judge advocates who were designated by TJAG as special legal assistance attorneys (SLAAs) could provide legal assistance any time, regardless of whether they were on or off duty, or assigned to a RC unit or not.<sup>167</sup> This distinction had no basis in law<sup>168</sup> and made very little sense. Obviously less reason exists to control the off-duty

legal assistance activities of judge advocates assigned to RC units than those not assigned to any unit at all. Nevertheless, previous legal assistance regulations went in just the opposite direction, effectively prohibiting off-duty legal assistance activities by those assigned to units unless they were designated as SLAAs.<sup>169</sup>

The procedure for authorizing RC judge advocates to provide legal assistance for retirement points was designed primarily for USAR judge advocates in the USAR Individual Ready Reserve (IRR)—that is, those not assigned to TPUs. Prior Army legal assistance regulations, however, never limited SLAA designation to judge advocates assigned to the IRR. Judge advocates assigned to the ARNG or to USAR TPUs generally earn the maximum number of retirement points each year that they are authorized to credit toward retirement through participation in weekend drills and AT. They generally do not need to perform legal assistance work to earn

<sup>163</sup> *Id.* para. 4-6.

<sup>164</sup> *Id.* para. 2-2a(2).

<sup>165</sup> Many USAR TPU judge advocates provide legal assistance in SJA offices during weekend drills on Army installations across the United States. This means that at many Army installations, legal assistance attorneys are available to assist eligible clients seven days a week. This legal assistance usually is provided as a result of appointments made by the AC SJA staff during the week. The old AR 27-3 did not comport with the reality of legal assistance practice in the Reserves even during peace time. *Cf. id.* para. 2-2a. The problems of clients, and the advice and assistance they require, do not always fit neatly into weekend drill periods. RC judge advocates who support AC legal offices during weekend drills frequently must provide follow-up advice and assistance during the week—often from their civilian law firms—such as making or answering follow-up telephone calls and investigating the facts or researching the law. The need to provide follow-up advice and assistance now is recognized in AR 27-3. AR 27-3, *supra* note 1, paras. 2-2a, 2-3b.

<sup>166</sup> See Policy Letter 88-1, Office of The Judge Advocate General, U.S. Army, subject: Reserve Component Premobilization Legal Preparation (4 Apr. 1988), reprinted in ARMY LAW., May 1988, at 3-4. Compare AR 27-3 (1989), *supra* note 3, para. 2-2a(2) with *id.* para. 2-4a(3).

<sup>167</sup> AR 27-3 (1989), *supra* note 3, para. 2-2a(3). Since 1961, the Army has authorized RC judge advocates to provide legal assistance for retirement points when not serving on active duty. See AR 608-50 (1961), *supra* note 151, para. 4b; DEP'T OF ARMY, REG. 608-50, PERSONAL AFFAIRS: LEGAL ASSISTANCE, para. 4b (28 Apr. 1965) [hereinafter AR 608-50 (1965)]; AR 608-50 (1974), *supra* note 24, para. 5b(2); DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: LEGAL ASSISTANCE, para. 1-6b(c) (1 Apr. 1984); AR 27-3 (1989), *supra* note 3, para. 2-2a(3). Since 1974, TJAG has delegated, by regulation, his authority to designate SLAAs to the Commandant, TJAGSA. See AR 608-50 (1974), *supra* note 27, para. 5b(2). An earlier delegation may have existed outside of the regulation. The award of retirement points in the past was processed through the Judge Advocate Guard and Reserve Affairs Department, TJAGSA. AR 608-50 (1965), *supra*, para. 4b, provided that SLAAs were designated "for the primary purpose of rendering legal assistance to members of the Active Army, and their dependents, assigned to units not having reasonable access to a legal assistance office of the Army, Navy, Air Force, or Coast Guard." Nevertheless, nothing indicates that geography ever played a part in determining which Reserve judge advocates were designated SLAAs. SLAAs provided all the legal assistance services that were provided by AC judge advocates. In 1974, SLAAs and other Army attorneys also were authorized to appear in court on behalf of "soldiers and dependents unable to pay legal fees for the services involved without substantial hardship to themselves or families." See AR 608-50 (1974), *supra* note 27, paras. 4a(3), 5b(2). In 1984, in-court representation was limited to service members—and to family members in cases not adverse to the service member—if TJAG and the nearest SJA approved. If the court was within 40 miles of the post, however, the SLAA had to be accompanied by an AC judge advocate as associate counsel. See *id.* paras. 1-6b(c), 2-5b(2)(b), 2-6b. The old AR 27-3 generally continued these procedures, but dropped the mileage requirement. See AR 27-3 (1989), *supra* note 3, para. 2-9. It continued the requirement for SJA approval of in-court representation in any case, including SJA approval for an SLAA to act alone without an AC judge advocate as associate counsel because one is not available. It also required TJAG approval of any in-court representation program initiated by an SJA, including one in which an SLAA participated. See *id.* para. 2-10b. The SLAA program continued basically unchanged until Operation Desert Storm.

<sup>168</sup> As to federal liability protection, the old AR 27-3 was more restrictive of "off-duty" legal assistance activities of RC judge advocates than 10 U.S.C. § 1054, which provides that the United States Attorney General will defend legal malpractice suits arising from "legal services" provided by

an attorney, paralegal, or other member of a legal staff within the Department of Defense (including the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32) or within the Coast Guard, in connection with providing legal services while acting within the scope of the person's duties or employment.

ARNG judge advocates, regardless of whether they are in a title 10 or title 32 status, are covered under this statute for legal malpractice claims arising from the "in scope" delivery of legal services. This coverage includes Department of Justice representation and removal to federal district court. See Policy Letter 89-2, Office of The Judge Advocate General, U.S. Army, subject: Malpractice Protection for National Guard Personnel Providing Legal Services (17 Feb. 1989), reprinted in ARMY LAW., Apr. 1989 at 4. The "in scope" delivery of legal services includes the performance of duties authorized by regulation such as the performance of legal assistance work pursuant to an authorization from the Chief, Legal Assistance Division, OTJAG. See Message (5 Mar. 1991), *supra* note 50, para. 5; *cf.* 32 U.S.C. § 502(f) (1988).

<sup>169</sup> Compare, e.g., AR 27-3 (1989), *supra* note 3, para. 2-2a(2) with *id.* para. 2-2a(3). SLAAs provided legal assistance—and presumably, in some instances, PLP—for retirement points, but were not required to request retirement points for the legal assistance they provided.

retirement points. Only judge advocates in the USAR IRR, including IMAs, need to do legal assistance or other work to earn enough points for a "good retirement year."<sup>170</sup>

### C. The War with Iraq—Mobilization and Demobilization

Not surprisingly, during and following the war with Iraq, many RC judge advocates expressed concerns over the extent to which, if at all, the United States Government would stand behind them if malpractice claims arose out of the legal assistance services they were providing to AC and RC personnel and their families incident to mobilization and demobilization. Their concerns were legitimate because the legal assistance regulation then in effect prohibited RC judge advocates, unless they were on duty, from providing legal assistance to anyone.<sup>171</sup>

Nevertheless, much of the assistance that occurred during peacetime was being provided by RC judge advocates during weekend drills, as well as during their "off duty" hours during the work week—often at their civilian law firms.<sup>172</sup> This problem became even more acute for RC judge advocates after large numbers of RC soldiers were called to active duty. The active duty status of these soldiers meant that all of the family members that they left behind also became entitled to legal assistance. Even some of the on-site assistance that was provided by RC judge advocates was without benefit of military orders which meant that they were just "volunteering their time" to meet the legal assistance work load.<sup>173</sup>

The method chosen to address the concerns of RC judge advocates about liability protection was to encourage all USAR and ARNG judge advocates to apply for designation as SLAAs.<sup>174</sup> Under the legal assistance regulation then in effect, SLAAs were not limited to providing legal assistance services during only weekend drills.<sup>175</sup> This was the easiest way to afford maximum liability protection to RC judge advocates. Any other method would have required a major revision of the legal assistance regulation then in effect. This measure promptly met the liability concerns of RC judge advocates. It also laid the foundation for the new approach taken in AR 27-3 concerning legal assistance in the Reserves.

### D. New Provisions

1. *RC Legal Assistance Providers.*—All USAR judge advocates assigned to TPU's and all ARNG judge advocates now may provide legal assistance unless inconsistent with superior orders or other duties or responsibilities, even while in civilian status, when acting pursuant to AR 27-3.<sup>176</sup> This is one of the most significant changes made in AR 27-3 in response to the many legal assistance "lessons learned" from Desert Storm.

In addition, all RC judge advocates, regardless of assignment, may continue to provide legal assistance while not on active duty if authorized by the Chief, Legal Assistance Division, OTJAG.<sup>177</sup> All ARNG and USAR judge advocates, including IMAs and others in the IRR, may—and are encour-

<sup>170</sup>To have a "good retirement year," an RC soldier seeks to earn the maximum of 50 points each year that he or she is allowed to accumulate and have credited toward his or her military retirement. Each RC soldier earns 15 points just for being in the Reserves. Therefore, they need to accumulate only an additional 35 points each year. Those assigned to the ARNG and USAR TPU's generally earn their maximum allowable 50 points each year through participation in weekend drills and AT. These judge advocates, when they perform "off-duty" legal assistance work, generally do so without applying for the retirement points they earn. Judge advocates in the IRR who are IMAs generally earn 12 of the 35 additional points they need each year by performing two weeks of AT with AC units. Judge advocates in the IRR who are not IMAs must earn their 35 additional retirement points—and IMAs their 23 additional points—through correspondence courses, paid active-duty training, and nonpaid training such as performing legal assistance or other legal work for retirement points.

<sup>171</sup>AR 27-3 (1989), *supra* note 3, para. 2-2a(2). Another liability concern raised by RC judge advocates was the requirement that they be designated legal assistance attorneys before they actually provide legal assistance. See *id.* para. 2-2a(2)(c). This requirement, although ministerial in nature, often was overlooked both in RC and AC legal offices.

<sup>172</sup>Clearly, they would not be covered on malpractice claims from military clients under most commercial insurance policies covering clients they served in their private legal practices.

<sup>173</sup>See DSAT Report, *supra* note 5, issue 359.

<sup>174</sup>Message, Headquarters, Dep't of Army, DAJA-ZA, subject: Designation of Special Legal Assistance Attorneys, para. 5C (191530Z Apr. 91).

<sup>175</sup>AR 27-3 (1989), *supra* note 3, para. 2-2a(3).

<sup>176</sup>*Id.* para. 2-2a(3), (4).

<sup>177</sup>*Id.* para. 2-2a(5). The new AR 27-3 eliminates the term "SLAA." Nevertheless, the concept of authorizing RC judge advocates to perform legal assistance work for retirement points is incorporated fully in the new regulation. See 27-3, *supra* note 1, para. 2-2b. The authority for designating SLAAs was decentralized during Desert Storm to allow them to be designated not only by the Commandant, TJAGSA, but also by every SJA of a Continental United States Army and by the commander of each installation having a casualty assistance command. See Message (5 Mar. 1991), *supra* note 50, para. 5. This provided much-needed flexibility to the SLAA designation process and facilitated the recruitment of additional RC judge advocates to assist with legal problems arising from casualty assistance and demobilization. This effort met with mixed results. One problem was that no single person knew the identity of all individuals who had been designated as SLAAs. If only from a liability concern, this had to be corrected. The liability concerns covered not only the type of guidance being given to SLAAs, but also the military status of those being appointed. For example, despite the clear guidance in the old AR 27-3 and the messages that were dispatched, one SJA appointed several retired judge advocates as SLAAs, and another SJA made designations after the authority was terminated. See Message, Headquarters, Dep't of Army, DAJA-LA, subject: New Designation Procedures for Special Legal Assistance Attorneys (SLAA'S), para. 5 (101200Z Feb. 1992) [hereinafter Message (10 Feb. 1992)] (terminating, effective 31 May 1992, all SLAA appointments made by anyone other than the Chief, Legal Assistance Division, OTJAG). Since 15 February 1992, only the Chief, Legal Assistance Division, OTJAG, has had the authority to authorize RC judge advocates to perform legal assistance work for retirement points. This consolidation of authority at HQDA identified—and as appropriate, redesignated—all SLAAs; developed up-to-date and complete records on all SLAAs; facilitated direct communication between the Chief, Legal Assistance Division, OTJAG, and all SLAAs; standardized procedures for supervising all USAR IRR SLAAs and evaluating their retirement points; and, most importantly, compiled a comprehensive directory of all RC judge advocates who were willing and able to provide legal assistance to eligible clients, to assist fellow judge advocates on legal assistance cases and issues, and to perform legal research on TJAGSA legal assistance publications and the contents of LAWS-LA computer programs. See Message (10 Feb. 1992), *supra*, paras. 5, 6.



aged to—apply for authorization, even if not seeking to earn retirement points.<sup>178</sup> Any RC judge advocate who wants to earn retirement points for legal assistance,<sup>179</sup> however, must submit an application to the Chief, Legal Assistance Division, OTJAG, and, as part of that application, must agree to be listed in the *JAGC Reserve Officer Legal Assistance Directory (Directory)*.<sup>180</sup> This requirement is based on the so-called “one Army” concept and on the needs of the Army Legal Assistance Program. If RC judge advocates want to earn retirement points for legal assistance they must agree to assist their fellow AC and RC judge advocates on legal assistance matters within their areas of specialty. One of the primary needs of the legal assistance program, given the diversity of state domiciliaries among its clients, is to identify and fully employ RC judge advocates across the United States who can assist on legal assistance issues, cases, and publications within their areas of expertise. This need now is met by AR 27-3 and the procedures in place, together with the success that has been achieved in expanding size and use of the *Directory*.

Reserve component judge advocates listed in the *Directory* agree to assist legal assistance attorneys on “legal questions and issues” in their areas of expertise.<sup>181</sup> They may, but are not required to, accept a legal assistance client referral.<sup>182</sup> They may, if they desire, volunteer to assist TJAGSA legal assistance instructors by updating the state-law-specific sections of TJAGSA legal assistance publications and LAAWS-LA software program materials.<sup>183</sup>

An application form, *DA Form 7206-R* (Application to Provide Legal Assistance Work for Retirement Points and to be Listed in the JAGC Reserve Officer Legal Assistance Directory) now is included in AR 27-3, together with directions on its submission and completion.<sup>184</sup> The records of officers listed in the *Directory*, which include all attorneys authorized to provide legal assistance for retirement points throughout the Army, are maintained in the Office of the Chief, Legal Assis-

tance Division, OTJAG. Each record includes the completed *DA Form 7206-R*; a copy of the letter authorizing the RC judge advocate to provide legal assistance for a period of three years; and all copies of correspondence to, from, and on behalf of, the RC judge advocate concerned.

ARNG and USAR TPU judge advocates may obtain retirement points by submitting their completed copies of *DA Form 1380* (Record of Individual Performance of Reserve Duty Training) through their units for all legal assistance work performed except legal research on a legal assistance subject on behalf of a TJAGSA instructor. All those performing legal research on a legal assistance subject, and all IMAs and other judge advocates in the IRR performing any type of legal assistance work for retirement points, submit their completed copies of *DA Form 1380* through Legal Assistance Division (Directory), The Judge Advocate General, 2200 Army Pentagon, Washington, DC 20310-2200.<sup>185</sup>

2. *RC Legal Assistance Clients.*—RC members and their family members are authorized to receive legal assistance under certain circumstances.<sup>186</sup> RC members serving on active duty for more than twenty-nine days, and their family members, may receive legal assistance on equal footing with AC service members and their families. Legal assistance for RC members serving on active duty for twenty-nine days or less, and their family members, continues to be limited, as under the prior legal assistance regulation, because of limited resources. AC legal offices often cannot meet the potential demand for legal services by RC personnel, which surges at certain installations when RC units perform their two weeks of AT. AC supervising attorneys, however, may now limit legal assistance to emergencies or to certain categories of cases for RC personnel on active duty for twenty-nine days or less, based on the availability of resources or expertise, regardless of where RC soldiers are training.<sup>187</sup>

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<sup>178</sup> AR 27-3, *supra* note 1, para. 2-2a.

<sup>179</sup> AR 27-3 does not govern the award of retirement points for matters unrelated to legal assistance, such as administrative law work. Those who desire to perform legal work unrelated to legal assistance for retirement points should obtain guidance from the judge advocate for whom the legal work will be performed.

<sup>180</sup> *Id.* para. 2-2b(2).

<sup>181</sup> *Id.* paras. 2-2b(1)(b), 4-5d.

<sup>182</sup> *Id.* paras. 2-2b(1)(a), 4-5d.

<sup>183</sup> *Id.* paras. 2-2b(1)(c), 4-5d. The last SLAA directory published by TJAGSA contained the names of 188 RC judge advocates. See THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 267, LEGAL ASSISTANCE GUIDE: OFFICE DIRECTORY ch. 3 (Sept. 1990). The first *JAGC Reserve Officer Legal Assistance Directory*, published by the Chief, Legal Assistance Division, OTJAG, on 19 August 1991, contained the names of 426 judge advocates. For the first time, the *Directory* included each listed judge advocate's geographical and specialty areas of practice. The current *Directory* (1992-1993), which also is included in the LAAWS-LA software program, contains the names of 562 judge advocates: 7 in the AGR, 115 in the ARNG, and 440 in the USAR. Within the USAR, 271 are assigned to TPUs, 151 are IMAs, and 18 are non-IMAs within the IRR—63 RC judge advocates also have volunteered to update TJAGSA legal assistance publications.

<sup>184</sup> AR 27-3, *supra* note 1, para. 2-2b(2).

<sup>185</sup> *Id.* para. 2-2b(3).

<sup>186</sup> See *supra* text accompanying notes 104-107.

<sup>187</sup> AR 27-3, *supra* note 1, para. 2-5a(2)(b); see note 159 and accompanying text.



For the first time, RC members are authorized by military regulation to obtain legal assistance services from RC judge advocates on a permanent basis. The language used in AR 27-3 to accomplish this is similar to that used to authorize legal assistance to RC members following the war with Iraq.<sup>188</sup> AR 27-3 authorizes RC judge advocates to provide legal assistance to RC members "on personal legal problems and needs that may adversely affect readiness or that have arisen from or been aggravated by military service, including military administrative matters."<sup>189</sup> The interpretation of this provision, and the extent to which legal assistance will be provided, if at all, is left to the discretion of RC supervising attorneys, who "may limit legal assistance to emergencies or to certain types of cases based on availability of expertise or resources."<sup>190</sup>

In addition, AR 27-3 authorizes both RC and AC judge advocates to provide PLP to RC soldiers and their family members.<sup>191</sup> AR 27-3 defines PLP as "[l]egal assistance counseling and the preparation of wills and powers of attorney, for ARNG and USAR soldiers and their family members in anticipation of the always present possibility of mobilization."<sup>192</sup>

The expansion of legal assistance in the Reserves is based on meeting the same military needs for which legal assistance is provided in AC units.<sup>193</sup> Another reason for this expansion is to provide legal assistance training and experience to all RC judge advocates, any of whom—as the last war demonstrated—may be called upon on very short notice to provide legal assistance to soldiers and their families.

### XIII. Types of Legal Assistance Cases

#### A. General

The breakdown of cases and services appearing in AR 27-3 predates the work in OTJAG and the United States Army

Legal Services Agency to develop "data modeling" wiring diagrams that fully describe the input and output of all legal services and support provided throughout the Army. In the Army Legal Assistance Program, "input" consists of the personal legal problems and needs of eligible clients that come within the scope of AR 27-3. "Output," on the other hand, consists of "services"—that is, preventive law services; administrative services for clients, such as notarizations; and client legal services, such as counseling, negotiation, and in-court representation.<sup>194</sup>

The listing of legal assistance cases and services in AR 27-3, although comprehensive, is not intended to be exclusive.<sup>195</sup> Supervising attorneys have authority to authorize legal assistance in any type of case not listed that involves an eligible client's personal legal affairs or needs.<sup>196</sup>

The new AR 27-3 divides all legal cases and services between those in which legal assistance is "required" and those in which legal assistance is "optional."<sup>197</sup> In other words, the characterization of a case depends on the availability of expertise and resources.<sup>198</sup> This breakdown, depicted at Appendix B of this article, represents the consensus of opinion expressed by the commands with which AR 27-3 was staffed. Those cases and services for which legal assistance is "required" reflect the following tenets behind the Army Legal Assistance Program:

- (1) The primary client to be served is the active duty soldier, especially those within the lower enlisted ranks.

- (2) The primary military needs met by the program are readiness, morale, and discipline.<sup>199</sup>

<sup>188</sup>Message (5 Mar. 1991), *supra* note 50, paras. 2, 3 (extending legal assistance to each RC member for a period of one year following his or her release from active duty, and for any legal problem that arose from or was aggravated by Desert Storm operations).

<sup>189</sup>AR 27-3, *supra* note 1, para. 2-5a(3). Although AR 27-3 (1989), *supra* note 3, did not authorize legal assistance on military administrative matters—such as helping a soldier respond to an adverse personnel action—it did not actually prohibit it. The omission probably was an oversight.

<sup>190</sup>AR 27-3, *supra* note 1, para. 2-5a(3)(b).

<sup>191</sup>*Id.* para. 2-5a(3)(a). PLP continues to be the only type of legal assistance authorized for family members of RC service members not on active duty. The new AR 27-3, however, authorizes both AC and RC judge advocates to provide PLP. During the staffing of the new AR 27-3 reviewers pointed out that AC units occasionally assist RC units with PLP.

<sup>192</sup>AR 27-3, *supra* note 1, glossary.

<sup>193</sup>*See supra* note 49 and accompanying text.

<sup>194</sup>This breakdown between cases and services provides the basis for the new categories for the revised client data card and legal assistance report developed in conjunction with the new AR 27-3. *See infra* notes 349-358 and accompanying text.

<sup>195</sup>AR 27-3, *supra* note 1, para. 3-5c(1).

<sup>196</sup>*Id.*

<sup>197</sup>*See supra* notes 141-148 and accompanying text.

<sup>198</sup>In RC Army legal offices, all legal assistance is optional. *See* AR 27-3, *supra* note 1, para. 2-6a(2).

<sup>199</sup>Attracting and retaining a quality force is a secondary military need met by the program. *See supra* note 49 and accompanying text.

(3) The most important cases are those in which a client is in serious legal difficulty or need.

(4) An attorney's time should be used to resolve problems and needs that require legal expertise or have command interest.<sup>200</sup>

(5) Consistent with available resources and expertise, certain minimum legal services should be provided to each client seen. That help includes alerting the client to the nature of the legal problem at hand, and either helping the client resolve the problem or referring the client to someone who can.

As reflected at Appendix B of this article, the new AR 27-3 breaks down legal assistance cases into ten separate categories.<sup>201</sup> The discussion below highlights the significant changes made by AR 27-3 in some of these case categories.

### B. Family Law

This area includes marriage, annulment, paternity, child custody, nonsupport, legal separation, divorce, and adoption. This traditional area of legal assistance is governed, for the most part, by applicable state law. AR 27-3 makes no significant changes in the way these cases are handled by legal assistance attorneys.

One area of continuing concern for legal assistance attorneys is *Army Regulation 608-99* (AR 608-99). This punitive regulation prohibits soldiers from wrongfully withholding custody of their children from a lawful custodian, and from failing to provide financial support to their family members, including in some cases, their illegitimate children. AR 608-99 presently prohibits, as a violation of a lawful general regulation, any soldier's failure to provide financial support to unmarried children under the age of eighteen years or to comply with a court order on child custody involving an unmarried child under the age of fourteen years.<sup>202</sup>

A recent draft revision of AR 608-99 proposed to raise these ages to twenty-one years in both situations. Given the punitive nature of AR 608-99, this change—whose merits are arguable<sup>203</sup>—could have increased greatly the involvement of legal assistance attorneys and others in cases over which the Army should have little official interest and in which the courts likely would never grant any relief, absent unusual circumstances.

In response to this proposed change, AR 27-3 provides, that "Family members seeking to enforce Army policy in cases involving financial support of children 18 years of age and over, custody of children 14 years of age and over in the absence of duress, and other cases, as appropriate" may be referred for help elsewhere on the installation, such as the inspector general's office, the proponent of AR 608-99, or the installation activity responsible for the enforcement of AR 608-99.<sup>204</sup>

This provision of the AR 27-3 has been overtaken by events. Because of the growing complexity of the subjects addressed by AR 608-99,<sup>205</sup> The Adjutant General, who is the proponent of this regulation, offered proponenty of AR 608-99 to TJAG, who accepted this offer.<sup>206</sup> Therefore, any future changes to AR 608-99 likely will not deviate from legal assistance policies, nor will those changes require legal assistance attorneys to get involved with policy-enforcement issues having no relationship to family law.

### C. Estates

1. *Wills*.—The original draft of AR 27-3 proposed specific guidance requiring attorney interviews with clients before wills were drafted, discouraging "mass" will executions (then defined as involving more than four wills at a time), cautioning against executing wills "that are quickly prepared" during readiness exercises, and counseling that wills "should ordinarily not be witnessed by other deploying soldiers during preparations for overseas movement and preparations for overseas replacement." Several commands that reviewed the draft regulation commented that, although the guidance was well

<sup>200</sup>This is one reason why assisting soldiers on matters affecting property accountability is required, but help on military driving privilege cases is optional.

<sup>201</sup>AR 27-3, *supra* note 1, para. 3-6.

<sup>202</sup>AR 608-99, *supra* note 123, paras. 1-7, 2-4, 2-5; *id.* glossary; see Alfred F. Arquilla, *Family Support, Child Custody, and Paternity*, 112 MIL. L. REV. 17 (1986) (discussing background and contents of AR 608-99).

<sup>203</sup>The apparent reason for the change was to bring the age limits into general conformity with DEP'T OF ARMY, REG. 600-8-104, IDENTIFICATION CARDS, TAGS, AND BADGES, para. 6-1e, app. b (15 July 1992) (addressing family member entitlement to military identification cards).

<sup>204</sup>AR 27-3, *supra* note 1, para. 3-6a(1).

<sup>205</sup>The author personally is aware of the great difficulties that the different proponents of AR 608-99 have experienced over the past 15 years in attempting to publish a legally sufficient regulation. The current AR 608-99, first published in 1985, took five years to write. Only after Army judge advocates in Washington, D.C., and from TJAGSA got involved in the drafting project did the regulation finally get published. With similar help, it later was revised in 1987. Since then, efforts to revise AR 608-99 have met with failure. During 1991 and 1992, OTJAG found two proposed draft revisions of AR 608-99 legally insufficient.

<sup>206</sup>Effective 26 April 1993, TJAG will be the proponent for AR 608-99. Thereafter, the Chief, Legal Assistance Division, OTJAG, will address all inquiries and other matters involving AR 608-99. A draft revision of AR 608-99 will be staffed for comment throughout the Army in late 1993.

intended, it was not very realistic outside an office environment.<sup>207</sup>

Accordingly, the guidance on wills was modified in the new AR 27-3. The new regulation requires that "[n]o will may be executed until an attorney interviews the client and reviews the will."<sup>208</sup> Furthermore, "an attorney will be present to supervise the execution of the will and will review the will after the client and witnesses have signed the will."<sup>209</sup> The requirement that an attorney interview the client at some time before the will is executed, and be present to supervise its execution, has been substituted for the language in the draft regulation that discouraged the mass execution of wills.

AR 27-3 requires that an attorney who drafts a will put his or her name and state bar on the will as its drafter.<sup>210</sup> Some of the commands that reviewed the draft regulation again expressed their concerns.<sup>211</sup> This requirement allows the drafter of the will to be located if, during probate proceedings, questions arise concerning the testator's intent. Because probate proceedings may take place years—if not decades—after a will is drafted, this information provides the easiest method for locating the responsible attorney, who may have long since left the Army. In addition, although no desire exists to "micro-manage" the way attorneys draft and execute wills, a means of accountability must exist should complaints (or litigation) arise. Finally, legal assistance attorneys should take professional pride and responsibility for the work they do, including the work done by the paralegals, legal clerks, and secretaries they supervise. They are cautioned that "[t]he

same legal professional standards that apply to preparing and executing wills in an Army legal office apply to those that are prepared and executed during a military exercise," and that "follow-up appointments" should be made when those standards cannot be met during an exercise.<sup>212</sup>

AR 27-3 also requires the attorney responsible for drafting the will to insert the following statement in each will he or she prepares (a statement that also is included as part of the LAAWS-LA wills program):

This document was prepared under the authority of 10 U.S.C. § 1044 and implementing military regulations and instructions by (*name of attorney*), who is licensed to practice law in (*name of one State or other legal bar*).<sup>213</sup>

Finally, in response to complaints received during and following Desert Storm, AR 27-3 provides that a "fill-in-the blank" will is permissible for states in which the execution of such wills specifically is authorized by statute.<sup>214</sup>

2. *Servicemen's Group Life Insurance.*—Following both the Gander crash and the Persian Gulf War numerous instances arose in which deceased soldiers had made "by-law" beneficiary designations on their Servicemen's Group Life Insurance (SGLI) forms, the legal effect of which obviously did not comport with their real wishes.<sup>215</sup> Of particular concern then, as now, was the widespread practice in personnel

<sup>207</sup> Several commands indicated that preparing wills during readiness exercises without also executing wills on the spot would be inefficient. These commands also asserted that eight to ten wills could be executed simultaneously without difficulty, and that using soldiers from the same unit—who also were testators—to witness wills was not a problem as long as self-proving clauses were used. The Army's efforts at regulating the manner in which wills are drafted and executed date back almost 50 years. War Dep't, Circ. No. 74, *supra* note 20, prohibited commanders from actually ordering soldiers to get wills; but, if they were to get wills, commanders were to encourage their soldiers to get them as soon as possible so as to discourage "[t]he practice of large numbers of military personnel of waiting until arrival at a staging area or port of embarkation to attend to the making of wills and the arrangement of other personal affairs . . ." *Id.* para. 2. This circular also discouraged "[t]he use of assembly-line methods and of standardized forms in making of wills for military personnel" and discouraged using military personnel as witnesses. *Id.* paras. 5, 7. The circular directed judge advocates to advise each service member for whom a will was prepared "to execute (the will) with the advice of legal counsel . . . the next time he is at home on leave or furlough, in the presence of three competent civilian witnesses who are permanent residents of the community and who will not be called into military service." *Id.* para. 7. Experience since has taught us that giving unexecuted wills to clients is not an acceptable practice because clients cannot be trusted to execute wills correctly, or to execute them at all. One recent probate case reported to the Legal Assistance Division, OTJAG, involved a service member who apparently thought his will could be executed, without witnesses, by a notary public at a credit union. Another recent case involved a family member who apparently believed her unsigned draft will was executed because it was typed.

<sup>208</sup> AR 27-3, *supra* note 1, para. 3-6b(2).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Putting attorneys' names and bar affiliations on the wills they drafted also raised concerns because disgruntled clients then might raise complaints directly to the bar. In addition, the practice might highlight that, in many cases, the attorney who drafted the will was not admitted to practice in the state for which the will was prepared.

<sup>212</sup> *Id.* para. 3-6b(2)(a).

<sup>213</sup> *Id.* para. 2-6b(2).

<sup>214</sup> *Id.* para. 3-6b(2)(b).

<sup>215</sup> One example of this type of problem, described in the LATF after-action report, involved a soldier who never knew his father and had been raised from birth by his mother. He therefore probably assumed that when he wrote "BY-LAW" on his SGLI election form that all SGLI insurance proceeds would go to his mother, the only parent he ever knew. Unfortunately, the father named on the birth certificate was located and consequently received one half of the soldier's SGLI benefits. The father even attended the funeral and bragged about his having seen his son only three times during his life, his having contributed nothing to his support, and his attending the funeral only to get his half of his son's \$100,000 SGLI benefit.

offices throughout the military services of encouraging service members to make so-called "by-law" beneficiary designations rather than designate beneficiaries by name. This means that, upon the service member's death, insurance proceeds are distributed to the service member's next of kin in accordance with federal law,<sup>216</sup> which may not always be consistent with the service member's intent.

Military lawyers and commanders dedicate a considerable amount of resources to ensure that service members have wills that fully reflect their true intents and that comply with applicable state laws. For most service members however, SGLI proceeds are, routinely, the largest part of their potential estate. This is even more true in light of a recent change in the law that raised the maximum amount of SGLI coverage that a service member may elect from \$100,000 to \$200,000.<sup>217</sup>

As a result of recent efforts by the chiefs of legal assistance from each of the military services,<sup>218</sup> under the auspices of the ABA Standing Committee on Legal Assistance for Military Personnel (LAMP), the Department of Veterans' Affairs revised the SGLI election form referenced in AR 27-3.<sup>219</sup> The new form, SGLV-8286 (dated Nov. 1992), presently is being

used throughout the military services, and more fully advises service members about the legal consequences of their SGLI beneficiary elections.<sup>220</sup>

AR 27-3 directs legal assistance attorneys to counsel service members about the legal effects of their SGLI beneficiary designations, especially "by-law" designations, when assisting them with their wills.<sup>221</sup> Service members also should be assisted with executing new SGLI election forms when the ones they have filed do not comport with their wishes. Although this assistance need not include the actual execution of SGLI election forms, attorneys should have blank forms, or copies of thereof, available so that they may show clients, in appropriate cases, how to complete this form so that their SGLI proceeds will be directed in the manner they desire. Service members also should be informed about the location of the appropriate personnel office where these forms need to be filed.<sup>222</sup> Furthermore, during readiness exercises, judge advocates are advised to "request to be stationed before the personnel and finance sections so that soldiers can receive legal advice before they designate SGLI and final pay beneficiaries."<sup>223</sup>

<sup>216</sup> See 38 U.S.C. § 1970. If the service member has named no beneficiary, SGLI proceeds shall be paid to the surviving widow or widower. If no surviving spouse exists, then proceeds shall be paid to the soldier's surviving children or *per stirpes* to their descendants. If no surviving children or descendants exist, then proceeds shall be paid to the soldier's surviving parents; if none, then to the executor or administrator of the estate; and, if none, then to other next of kin in accordance with the laws of intestate succession for the service member's domicile at the time of death.

<sup>217</sup> Veterans' Benefits Act of 1992, 138 CONG. REC. S173364-01 (enacted 29 Oct. 1992) (codified as 38 U.S.C. § 1967).

<sup>218</sup> The primary action officer for this effort was Captain Laurel L. Wilkerson, Judge Advocate General's Corps, U.S. Army, currently assigned to Legal Assistance Division, OTJAG.

<sup>219</sup> SGLV-8286, Servicemen's Group Life Insurance Election and Certificate (Mar. 1988).

<sup>220</sup> The new form, SGLV-8286, Servicemen's Group Life Insurance Election and Certificate (Nov. 1992), advises the service member on the following matters:

- Cautions the service member about the importance of by-name designations when the service member is a stepchild or stepparent, was abandoned by one or both parents or adopted, or is separated from his or her spouse.
- Advises service members that wills or powers of attorney—as well as events occurring after the form is signed, such as separations or divorces—have no effect on changing beneficiaries designated on the form to receive SGLI proceeds.
- Informs service members of some of the potential "pitfalls" involved in designating minor children to receive SGLI proceeds. This information advises that SGLI proceeds can be paid only to a court-appointed guardian of a child. That person usually, but not always, will be the surviving parent, if any, of the child.
- Informs the service member that he or she may establish a trust, naming a trustee who would receive the SGLI proceeds and would administer them for the benefit of the children.
- Informs the service member that he or she may consult with a military attorney, at no personal expense, about any matter on the form, to include the establishment of a trust.

<sup>221</sup> AR 27-3, *supra* note 1, para. 3-6b(1). In the Army, by-law designations no longer should be a problem. On 11 February 1993, the Army Chief of Staff, General Gordon R. Sullivan, approved a TJAG recommendation to prohibit "by-law" designations throughout the Army. Message, Commander, Personnel Command, TAPC-PEC, subject: Servicemen's Group Life Insurance (SGLI) Program Change (01130Z Mar. 93). Earlier, on 21 January 1993, the ABA LAMP Committee adopted a resolution that

supports and urges action by the Secretary of the Defense and with regard to Coast Guard personnel, the Secretary of the Treasury, to publish appropriate directives requiring all service members who elect to purchase (SGLI) insurance to designate beneficiaries by name, rather than 'by law' as is commonly the practice at the present time.

This resolution likely will be proposed for adoption by the ABA House of Delegates in August 1993.

<sup>222</sup> *Id.* DEP'T OF ARMY, REG. 608-2, PERSONAL AFFAIRS: GOVERNMENT LIFE INSURANCE SERVICEMEN'S GROUP LIFE INSURANCE, VETERANS' GROUP LIFE INSURANCE, UNITED STATES GOVERNMENT LIFE INSURANCE, NATIONAL SERVICE LIFE INSURANCE, para. 2-23d (15 Sept. 1989) [hereinafter AR 608-2] (providing that "[a] designation or change of beneficiary will not be valid unless it is received by [the Office of the Servicemen's Group Life Insurance], the custodian of the [Military Personnel Records Jacket], or authorized representative before the soldier's death").

<sup>223</sup> AR 27-3, *supra* note 1, para. 3-6b(1)(b).

3. *Casualty Assistance*.—Legal assistance on matters relating to the settlement of estates now may be extended to the PNOK (including surviving parents) of "AC or RC soldiers who die while in a military duty status," and to the PNOK of "civilian employees of the Department of Defense . . . who are serving with or accompanying United States Armed Forces in a combat zone at the time of their deaths."<sup>224</sup> These provisions extend legal assistance on estate matters for the first time to surviving parents—not just surviving spouses and children—and to the PNOK of RC soldiers and DOD civilian employees in the circumstances described.<sup>225</sup> AR 27-3 directs the attention of legal assistance attorneys to the fact the distribution of SGLI proceeds to certain PNOK may be restricted by law in certain situations.<sup>226</sup>

4. *Life-threatening Injuries and Illnesses*.—Legal assistance attorneys occasionally are called upon to provide legal advice on so-called military "death-bed" retirements. The advice sought is whether the surviving spouse or children would be financially better off, insofar as military benefits are concerned, if a terminally ill or fatally injured soldier were to die while on active duty or while in a retired status.<sup>227</sup> AR 27-3 identifies others on the installation who can provide assistance in this area, and indicates that assistance also may be sought from the Legal Assistance Division, OTJAG.<sup>228</sup>

#### D. Economic—Veteran Reemployment Rights Law

For the first time, AR 27-3 provides guidance<sup>229</sup> to legal assistance attorneys on assisting RC soldiers who seek reemployment under the Veteran Reemployment Rights Law (VRRL)<sup>230</sup> and similar state statutes. This guidance is basically a restatement of previous information distributed by the LATF following Operation Desert Storm while RC soldiers were being demobilized.<sup>231</sup> Then, as now, judge advocates are cautioned in VRRL cases not to contact an employer or take any other action that may be viewed by the Department of Justice or the Department of Labor (DOL) as legal representation of the soldier.<sup>232</sup> The reason for this restriction on legal assistance is that such legal representation could jeopardize a soldier's ability to obtain free help from the DOL in getting his or her job back, or in obtaining free representation in court from a United States Attorney should litigation become necessary.<sup>233</sup>

The mere involvement of DOL often will motivate employers quickly to settle VRRL cases to the service member's advantage. For this reason, together with the free cost of the DOL's assistance, restricting the involvement of legal assistance attorneys in VRRL cases, at least initially, often works to the benefit of service members. DOL assistance however,

<sup>224</sup> AR 27-3, *supra* note 1, para. 2-5a(8); see *supra* note 106 and accompanying text.

<sup>225</sup> See AR 27-3 (1989), *supra* note 3, para. 2-4a(7).

<sup>226</sup> AR 27-3, *supra* note 1, para. 3-6b(3). The citation appearing in this subparagraph of the regulation is incomplete. It should be 38 C.F.R. ch. I, pt. 9 (Service-men's Group Life Insurance and Veterans' Group Life Insurance) (1 July 1991). Of particular importance is 38 C.F.R. ch. I, pt. 9.1(s)(3), which basically restates 38 U.S.C. § 1965(9). That subpart covers "by-law" distributions when surviving parents are the potential beneficiaries, and provides, "No person who abandoned or willfully failed to support a child during his or her minority, or consented to his or her adoption may be recognized as a parent for the purpose of Servicemen's Group Life Insurance." This provision goes further to provide that sufficient evidence must be presented in a timely manner to show that the person could not qualify for payment by virtue of this provision, and that when payment already has been made, a duplicate payment will not be made. The principal problem with this rule is that the person in the best position to present this evidence usually is the deceased service member, and that other potential beneficiaries likely will not become aware of the rule in a timely manner. See Willis, *Naming beneficiary now avoids court fight later*, ARMY TIMES, 23 Nov. 1992, at 6, col. 2 (disclosing that 85 lawsuits filed by the relatives of deceased service members over SGLI beneficiary designations are pending in federal district courts). Timely advice to the PNOK on this provision may eliminate the need for some lawsuits to be filed. Unfortunately, for many beneficiaries, "by-law" often means "by-lawsuit." "By-law" distribution problems still may occur in the Army, such as when soldiers improperly execute the SGLI-8286 or designate beneficiaries who predecease them, or when soldiers—following entry on active duty—die before executing an SGLI-8286. In the latter situation, automatic SGLI coverage is limited to \$100,000.

<sup>227</sup> The answer in almost all cases is that the soldier should be retired at 100% disability and elect the maximum amount of coverage under the Survivor Benefit Plan. See 10 U.S.C. § 1448.

<sup>228</sup> AR 27-3, *supra* note 1, para. 3-6b(4). Officials of the Army-Air Force Mutual Aid Association (AAFMAA) always have been available to provide immediate assistance free of charge to the families of both its members and nonmembers. The AAFMAA, using its computer-generated programs, quickly can produce individually tailored schedules of life-time government benefits payable to the survivors of a soldier who dies on active duty or in a retired pay status.

<sup>229</sup> *Id.* para. 3-6e(2).

<sup>230</sup> 38 U.S.C. §§ 2024(c), (g); *id.* § 4321. A good summary of this law is contained in Legal Assistance Item, *Veterans' Law Note*, ARMY LAW., Dec. 1990, at 41.

<sup>231</sup> See, e.g., Message, Headquarters, Forces Command, FCJA, subject: Home Station Demobilization Briefings (221654Z May 91).

<sup>232</sup> *Id.*; AR 27-3, *supra* note 1, para. 3-6e(2)(a).

<sup>233</sup> Message, *supra* note 231. The content of this message, as well as AR 27-3, *supra* note 1, para. 3-6(2), was staffed through, and discussed with, DOL officials. Officials at the DOL apparently guard the department's "turf" very jealously in VRRL cases. The DOL fully "beefed up" its enforcement division following Desert Storm to handle an anticipated stampede of VRRL cases—cases that actually never occurred. Given the size of the call-up, relatively few VRRL cases arose, but judge advocates expressed utter dissatisfaction with the way the DOL handled some of these cases. The problem is one of approach. Specifically, a legal assistance attorney naturally, and quite properly, will want to grab a VRRL case by the horns as a client's advocate. DOL officials, on the other hand, seek to enforce the law. Usually, no conflict arises between the two approaches and the client benefits from the free help provided by the DOL. Nevertheless, in enforcing the law—as opposed to justice for the client—the DOL occasionally may approach a particular VRRL case intending to develop case law that will benefit all service members in the future. The DOL will pursue relief on behalf of a service member with less than "good facts" when and if litigation should become necessary. In addition, the DOL may delay pursuing relief in one case because another pending VRRL case might establish better precedent or might have a greater chance of succeeding in the same or different federal circuit.

is not without problems in some cases, and for this reason, the Chief, Legal Assistance Division, OTJAG, has authority under AR 27-3 to grant exceptions to this restriction and to authorize in-court representation in appropriate VRRL cases.<sup>234</sup> Additionally, the restriction on the activity of legal assistance attorneys in VRRL cases does not apply to a reemployment rights case being pursued under state law.<sup>235</sup>

#### E. Military Administrative Cases

The wide range of military administrative actions in which soldiers may become involved is an important area of legal assistance work. The importance of this area is apparent when one considers that most clients assisted in these cases are soldiers and that a fair and prompt disposition of these cases enhances discipline, morale, and readiness.<sup>236</sup>

Some legal assistance attorneys view their roles as family law practitioners with primary emphasis on assisting clients with wills, divorces, adoptions, landlord-tenant and contract disputes, and consumer-credit problems. They view many of the military administrative difficulties in which soldiers sometimes become involved as generally arising from acts of misconduct that should be handled by USATDS attorneys. Many USATDS attorneys, on the other hand, together with trial counsel and military judges, view these cases of "secondary importance" to the trial of court-martial cases.

Some legal assistance attorneys believe all military administrative cases should be handled by USATDS attorneys. Undoubtedly an equal number of USATDS attorneys believe that all such cases should be handled by legal assistance attorneys.

At a number of installations these differences of opinion have been resolved in memoranda of understanding (MOUs) between SJAs and USATDS counsel. The content of these MOUs generally provide that USATDS attorneys should assist clients who cannot be helped by legal assistance attorneys because of conflicts of interest, and that USATDS attor-

neys should handle certain military administrative cases arising out of acts of misconduct. The division of specific military administrative cases between legal assistance and USATDS attorneys was inconsistent from one military installation to another.

One primary goal undertaken in revising AR 27-3 was to distinguish the legal services provided under the legal assistance program from those provided by USATDS attorneys. Nevertheless, an absolute, unqualified division of all military administrative cases between SJAs and USATDS is not possible. Appendix B of this article reflects the detailed, but qualified, breakdown between legal assistance cases and USATDS cases contained in AR 27-3.<sup>237</sup> This division of cases, as well as the qualifying language preceding it, represents a compromise reached after numerous discussions between the Chief, Legal Assistance Division, OTJAG, and the Chief, USATDS, both before and after 20 December 1991, when the draft copy of AR 27-3 officially was staffed for comment throughout the Army.

The goal in dividing military administrative cases between legal assistance and USATDS attorneys was not to shift as much of this workload as possible to USATDS. The primary mission of USATDS attorneys is to defend soldiers being tried by courts-martial. But for this primary mission, USATDS would not exist. None of the other valuable legal services provided by USATDS attorneys, such as counseling soldiers facing nonjudicial punishments or adverse personnel actions, would have justified establishing USATDS as an organization separate and apart from the SJA offices from which USATDS positions were taken. This philosophy is incorporated fully in AR 27-3,<sup>238</sup> and likely will not change in the future.

Some also have suggested that USATDS should be staffed more fully so that its attorneys can "help out more" with the client work load on military administrative matters, or assume the legal assistance mission altogether.<sup>239</sup> These suggestions, however, miss the point that USATDS was established as a "stove pipe" organization, not to deliver client legal services

<sup>234</sup> AR 27-3, *supra* note 1, para. 3-6e(2)(d). When the DOL's pursuit of good precedent does not serve a legal assistance client's needs for prompt legal relief, a request for an exception is more than appropriate. Attorneys in the Legal Assistance Division, OTJAG, have brought the dissatisfaction of some legal assistance clients to the attention of DOL officials in Washington.

<sup>235</sup> *Id.* para. 3-6e(2)(d). In one case, an RC judge advocate received retirement points for assisting two soldiers in reacquiring part-time jobs that they had lost following AT. The RC judge advocate prevailed before an administrative law judge by citing a state antidiscrimination law. See Veterans' Law Note, *Retirement Points for Legal Assistance, State Law Remedies Available for Some Reservists*, ARMY LAW., Nov. 1992, at 41-42.

<sup>236</sup> See *supra* text accompanying note 49.

<sup>237</sup> AR 27-3, *supra* note 1, para. 3-6g(4), (5).

<sup>238</sup> *Id.* paras. 3-6g, 3-8a(1).

<sup>239</sup> The wisdom of not combining these diverse client services was recognized 50 years ago—some 35 years before USATDS was established.

A legal assistance office as such will *not* advise or assist military personnel in any case in which such personnel are or probably will be the subject of court-martial investigation or charges. Legal assistance officers should *not* be consulted by such personnel, and will refuse to receive confidences from them concerning such matters unless authorized by competent orders to defend them.

Cir. No. 74, *supra* note 20, para. 10b.

efficiently,<sup>240</sup> but solely to eliminate the perception that Army defense counsel were not truly independent from those responsible for prosecuting their clients.

Several commands through which AR 27-3 was staffed commented that the detailed delineation between legal assistance and USATDS cases would be very helpful in developing a more uniform approach among Army installations that provide legal services. Although AR 27-3 does not prohibit MOUs between SJA offices and USATDS counsel, the intent was to make such MOUs unnecessary. At a minimum, AR 27-3 provides a common point of reference for negotiating MOUs, which also should foster a greater degree of uniformity among Army installations.<sup>241</sup>

Although it might have been helpful to establish a bright-line rule that all military administrative cases involving hearings should be handled by USATDS attorneys and those that do not should be handled by non-USATDS attorneys, this was not realistic, desirable, or necessary. While some USATDS attorneys may possess greater expertise in representing soldiers at military administrative hearings, developing this expertise in others is also important. These cases also should not divert USATDS attorneys from their primary military justice mission, which requires a significant amount of training.

Those military administrative cases listed as USATDS cases under AR 27-3—that is, officer and enlisted separation actions, officer resignations in lieu of criminal or administra-

tive proceedings, reductions in grade, and recruiter misconduct—involve hearings requiring representation. In addition, these cases likely involve allegations of serious misconduct and pending criminal charges against soldiers.

On the other hand, cases listed as “SJA [legal assistance] cases” generally do not involve hearings, and are less likely to involve serious misconduct or pending criminal charges.<sup>242</sup> Also, legal assistance generally is “optional” in cases that possibly may involve hearings.<sup>243</sup> Two exceptions are military investigations, in which soldiers are named as respondents, and actions initiated by soldiers to correct their military records.<sup>244</sup>

Nevertheless, even though legal assistance may be “required” —or initially may be provided—in a case in which a client may be “authorized” the presence and assistance of counsel at an eventual hearing, this does not mean that a client has the right to the presence and assistance of military counsel during the hearing.<sup>245</sup> The scope of legal assistance, even in “required” cases, can be limited by a supervising attorney. This is because a non-USATDS attorney who desires to appear as counsel before a military administrative hearing first must have the approval of a supervising attorney.<sup>246</sup> Therefore, the list of military administrative cases for which legal assistance to clients is “required” must be read in conjunction with the requirement that the approval of a supervising attorney is required to represent these clients in administrative board proceedings.

<sup>240</sup>One proposal would combine all “client services”—legal assistance, trial defense, and claims—under the authority of one judge advocate at each installation. Claims, however, would not be included under this category. See generally, AR 27-20, *supra* note 82. The field-grade judge advocate who formerly occupied the position of deputy SJA on an installation, or deputy command judge advocate for a command, typically would occupy this new position. The officer occupying this position, and his and her staff of military and civilian personnel, would report directly to a Washington-based headquarters, through a structure similar to the system established by USATDS. The SJA, and his or her remaining staff, would continue to advise the commander on military justice, administrative law, international and operational law, labor law, environmental law, contract law, and other legal matters. The feasibility of this proposal is questionable because it would require more manpower and other resources at a time when the Army is decreasing in size. It also would remove the flexibility that supervisors presently possess to shift resources in and out of claims and legal assistance. If more manpower is not provided, the scope and quality of legal assistance services likely would suffer throughout the Army because trial defense and claims—unlike legal assistance—are services that are required by law. In the other military departments—and in the Army before the USATDS formally was established—personnel providing legal assistance generally worked in offices separate from attorneys who processed claims or defended soldiers at court-martial. The one exception is the Air Force, in which legal assistance typically is an extra duty for most judge advocates assigned to base legal offices, where supervising attorneys usually designate times when judge advocates are to perform these services each duty day.

<sup>241</sup>AR 27-3, *supra* note 1, para. 3-6g(c), (e).

<sup>242</sup>*Id.* para. 3-6g(4).

<sup>243</sup>*Id.* para. 3-6g(4)(q) (physical evaluation boards); *id.* para. 3-6g(4)(r) (flying evaluation boards); *id.* para. 3-6g(4)(t) (medical evaluation boards); *id.* para. 3-6g(4)(w) (military driving privileges).

<sup>244</sup>*Id.* para. 3-6g(4)(m), (x). The correction of military records is governed by DEP'T OF ARMY, REG. 15-185, BOARDS, COMMISSIONS, AND COMMITTEES: ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (18 May 1977) [hereinafter AR 15-185]. Attorneys providing legal assistance will counsel and assist clients on correcting their military records and, with the approval of supervising attorneys, may represent clients before the Army Board for Correction of Military Records (ABCMR) if the ABCMR grants a hearing in the case. “No expenses of any nature whatsoever voluntarily incurred by the applicant, his/her counsel, his/her witnesses, or any other person in his/her behalf will be paid by the Government.” *Id.* para. 28. This does not, however, prohibit representation before the ABCMR by an attorney during the course of providing legal assistance duties—when representation has been approved by a supervising attorney in accordance with AR 27-3, para. 3-7g(1). Nor does it prohibit an Army command from paying a legal assistance attorney any necessary travel or *per diem* required when representing a client before the ABCMR. AR 15-185, *supra*, para. 28. Because legal assistance is an official duty, having an eligible client pay these expenses—if a command refused to do so—would be inappropriate. In cases in which TJAG approval previously had been required for a legal assistance attorney to represent clients before the ABCMR, AR 27-3, para. 3-7g(1), now delegates this authority to supervising attorneys.

<sup>245</sup>AR 27-3, *supra* note 1, para. 1-1a.

<sup>246</sup>*Id.* para. 3-7g(1) (requiring supervising attorney to approve in-court representation by a legal assistance attorney); *id.* glossary (defining in-court representation as including “[a]ppearing . . . as counsel on behalf of a client in a military . . . proceeding”).



The division of military administrative cases between SJAs and USATDS must be read in conjunction with the guidance that precedes it. AR 27-3 provides the following:

*Subject to other USATDS mission requirements, USATDS attorneys should ordinarily assist soldiers on military administrative actions that—*

- (a) Are initiated on the basis of alleged violations of the Uniform Code of Military Justice (UCMJ); or
- (b) Are related to impending, pending, or recently completed UCMJ proceedings.<sup>247</sup>

Many of the military administrative cases listed as “SJA [legal assistance] cases,” such as bars to reenlistment, suspensions of favorable personnel actions, and memoranda of reprimand almost always are initiated on the basis of alleged UCMJ actions, or “impending, pending or recently completed UCMJ proceedings.”<sup>248</sup> So why are these not listed as USATDS cases? The basis for most of these actions almost always will be the UCMJ, and therefore a USATDS concern. The workload and availability of the USATDS counsel, however, may dictate that what would otherwise be a USATDS case, will be a legal assistance matter.<sup>249</sup>

This qualified division of military administrative cases recognizes that legal assistance and USATDS staffing and client case loads vary considerably from one installation to another. This disparity occurs because the staffing of a USATDS office on any particular installation is based, as it should be, on

accomplishing the primary mission of USATDS on that installation, not on providing legal assistance services. For this reason, USATDS attorneys are not stationed at every Army installation, and their availability at all installations to assist on legal assistance cases always will be subject to other USATDS missions.<sup>250</sup>

The new AR 27-3 defines the scope of the Army Legal Assistance Program in this area for the first time, and provides a rational basis for dividing military administrative cases between USATDS and non-USATDS attorneys on a case-by-case basis or by MOU.<sup>251</sup> Consequently, AR 27-3 will foster a greater degree of uniformity from one installation to another on who handles these cases. This will allow training to be focused on actual legal assistance practice and will improve statistical reporting.<sup>252</sup> AR 27-3 also provides a great degree of flexibility from one Army installation to another based on SJA and USATDS staffing and client case loads. Most importantly, the guidance provided supports the client because it seeks to avoid, whenever possible, the need for a client to see more than one attorney on legal actions arising from the same course of conduct or misconduct.<sup>253</sup> This, in turn, also enhances the efficiency of all client legal services by eliminating duplication of effort and unnecessary referrals back and forth between USATDS and non-USATDS attorneys.<sup>254</sup>

Except for military administrative cases, USATDS attorneys, when they provide legal assistance, are required to comply with all the record-keeping, reporting, and other requirements contained in AR 27-3. USATDS attorneys also are required to comply with “locally established legal assistance policies and procedures.”<sup>255</sup> These local policies and procedures include those contained in local SJA policy letters and command directives issued pursuant to AR 27-3.<sup>256</sup>

<sup>247</sup>*Id.* para. 3-6g(2) (emphasis added).

<sup>248</sup>*Id.* para. 3-6g(2); *id.* para. 3-6g(4)(f), (i), (j).

<sup>249</sup>*Id.* para. 3-6g(3).

<sup>250</sup>In conjunction with planned military budget cuts during the 1993 and 1994 fiscal years, 36 authorized USATDS judge advocate positions are being eliminated. Because USATDS counsel are dispersed, USATDS field offices at some Army installations will be closed, and USATDS attorneys will be forced to limit their legal work to military justice cases only. In contrast, both the Air Force and the Navy take the view that military administrative cases are not legal assistance and should be handled by military defense counsel. The Air Force, however, does not have a separate military defense service. Accordingly, the organization under which Air Force attorneys provide legal assistance gives supervising judge advocates greater flexibility in assigning their attorneys as defense counsel in these cases. See *supra* note 224. The Navy, on the other hand, which has a separate defense service, concentrates its legal services at several large Naval bases throughout the world. The Army's legal services, however, are far more decentralized, operating from numerous legal offices located on installations worldwide.

<sup>251</sup>*Id.* para. 3-6g(e).

<sup>252</sup>*Id.* para. 3-6g(3)(d). AR 27-3 clarifies the distinction between legal assistance cases and USATDS cases for reporting purposes. Any case relating to military personnel administrative proceedings or military justice handled by a USATDS attorney is a USATDS case; any other type of case handled by a USATDS attorney and any client service case handled by a non-USATDS attorney is a legal assistance case. See *id.* paras. 1-4c, 3-6g(3); *id.* apps. B-2a(4), B-4d(7).

<sup>253</sup>*Id.* para. 3-6g(3)(b).

<sup>254</sup>*Id.* para. 3-6g(3)(a).

<sup>255</sup>*Id.* para. 1-4c.

<sup>256</sup>See *supra* notes 139-156 and accompanying text. Because legal assistance is a commander's program, the term “supervising attorney” does not include a USATDS regional or senior defense counsel. See AR 27-3, *supra* note 1, glossary.



In conclusion, the decision on whether a USATDS attorney should assist a client on a military administrative or other legal assistance case should depend on the answers to the following questions:

(1) Are attorneys in the SJA or USATDS office precluded from assisting the client because of a conflict of interest? If the answer to this question is "yes," every effort should be made by attorneys in the nonconflicted office to assist the client.

(2) Is the client already being assisted on the same or related problem by an attorney in the SJA or USATDS office? If the answer to this question is "yes," every effort should be made, consistent with the client's wishes and needs, to continue legal assistance with the same attorney, or with an attorney from the same office. If assistance cannot be provided in a timely manner by that attorney or office, an attorney from the other office, if available, should provide the legal assistance required.

(3) Is the client seeking legal help for the first time on a particular legal assistance problem or need involving a military administrative action? If the answer to this question is "yes," then a non-USATDS attorney should provide assistance unless one of the following conditions exists:

(a) An agreement exists between a legal assistance and USATDS attorneys to the contrary; or

(b) The administrative action arises from a violation of the UCMJ or is related to a UCMJ proceeding, and a USATDS attorney is available to provide legal assistance.

## F. Taxes

Tax, as one category of legal assistance cases, includes federal, state, and foreign taxation of property and income.<sup>257</sup> In this category, all legal assistance services, such as counseling, correspondence and negotiation with tax officials and others, preparation and filing of tax returns, and referrals to civilian lawyers, are provided.<sup>258</sup>

Federal and state income tax assistance—to include the preparation and electronic filing of returns—continues to be a major feature of the Army Legal Assistance Program.<sup>259</sup> As in the past, tax assistance services continue to have separate reporting requirements. The specific requirements for after-action reports at the end of the tax season (due 1 June for installations in the United States and 1 July for those outside the United States) now are contained in AR 27-3.<sup>260</sup>

The previous legal assistance regulation required TJAG approval of any request (presumably from an Army installation commander) "to establish a commercial tax preparation service that compete with a free service under the Army Tax Assistance Program."<sup>261</sup> This provision lost its effectiveness when, prior to 1989, HQDA allowed the Army and Air Force Exchange Service (AAFES) to enter into a concessionaire contract with H&R Block. This decision permitted H&R Block to provide tax preparation services on Army installations subject to command authorization.

AR 27-3 continues to recognize that installation commanders have the final say on who provides tax services on the installation and that TJAG's role is limited. TJAG cannot prevent commercial tax services from being provided on a particular installation.<sup>262</sup> TJAG only can influence that decision by continued support of the legal assistance effort at each installation to provide free tax assistance services to soldiers and their families.

Accordingly, AR 27-3 requires commanders "to consult with their (SJAs) on the need, if any, to establish or continue commercial tax services (or any other legal assistance-type

<sup>257</sup> AR 27-3, *supra* note 1, para. 3-6i.

<sup>258</sup> *Id.* para. 3-7b, c, e, f, h.

<sup>259</sup> Unlike the previous legal assistance regulations, AR 27-3 does not mention tax programs, preventive law programs, expanded legal assistance programs, and other such programs. For the purpose of logical consistency, only one program appears in AR 27-3—that is, the Army Legal Assistance Program. Everything else in this program is either a legal assistance case or a legal assistance service. Compare AR 27-3 (1989), *supra* note 3, para. 2-5a(5) with AR 27-3, *supra* note 1, para. 3-5i.

<sup>260</sup> AR 27-3, *supra* note 1, para. 5-4a.

<sup>261</sup> AR 27-3 (1989), *supra* note 3, para. 2-5a(5).

<sup>262</sup> During the 1992 tax season (during which 1991 tax returns were prepared and filed) the commanders on nine Army installations did not authorize H&R Block to provide commercial tax assistance services. Although this number continues to grow smaller each year, many conscientious commanders continue to place the interests of their soldiers above the increased revenue they could derive for their installation morale, welfare, and recreation (nonappropriated) funds by permitting commercial tax assistance services to operate on their installations. Of particular concern is the promotion of so-called refund anticipation loans. See Alfred F. Arquilla, *Income Tax Assistance in the Army*, in ABA Standing Committee on Legal Assistance for Military Personnel, 4 THE LAMPLIGHTER, no. 1, at 1 (Fall 1992).

services) on their installations.”<sup>263</sup> A similar responsibility exists on the part of SJAs to initiate this consultation and to keep commanders informed about Army tax assistance services on the installation.<sup>264</sup>

### G. Civilian Criminal Matters

The initial draft of AR 27-3 proposed restricting legal assistance attorneys handling civilian criminal matters from contacting civilian court or prosecuting officials to obtain information, to request delays in proceedings, or to request that charges be dismissed. The reason for this proposed restriction was that civilian criminal matters, like military justice matters, did not fit squarely within the definition of what one usually would define as a client’s “personal legal affairs.”<sup>265</sup>

Consistent with comments made on other parts of AR 27-3 during its staffing, however, legal assistance attorneys wanted to do more, not less, in assisting clients. Legal assistance attorneys want to assist clients by finding out whether a warrant for arrest has been issued, by attempting to quash it if one has been issued, by attempting to get criminal charges dismissed, reduced, or resolved administratively, and by negotiating “long-distance” pleas on behalf of clients located far from the court in which they are suppose to appear. Many of these clients are the minor children of service members and other eligible clients.

Because of comments received during the staffing of AR 27-3, the guidance on civilian criminal matters was rewritten to authorize the very things the draft regulation would have prohibited. Legal assistance remains optional on civilian criminal matters, but nothing restricts legal assistance on these

matters, other than the area of in-court representation. This guidance is consistent with the previous legal assistance regulation.<sup>266</sup> Based on comments received during staffing, however, in-court representation now is allowed—if authorized by a supervising attorney—for civilian criminal matters heard before a United States magistrate on a military installation.<sup>267</sup> In-court representation in these cases, unlike in civil proceedings, is not limited to soldiers, but the financial hardship test applies in determining which clients are eligible for in-court representation before a United States magistrate.<sup>268</sup>

In-court representation before a United States magistrate should be the exception, rather than the norm, and supervising attorneys carefully should review requests for in-court representation on a case-by-case basis. As with in-court representation in civil proceedings, supervising attorneys are expected to coordinate policies in this area with the court and appropriate bar associations before authorizing in-court representation before a United States magistrate.<sup>269</sup>

## XIV. Types of Legal Assistance Services

### A. General

The Army Legal Assistance Program provides for two types of services: preventive law services and client services.<sup>270</sup> The following discussion highlights changes from the previous legal assistance regulation in these areas.

### B. Preventive Law Services

Preventive law once was a separate program with its own Army regulation.<sup>271</sup> The “program” and its regulation then

<sup>263</sup> AR 27-3, *supra* note 1, para. 1-4f(2). Although this author knows of no plans by AAFES or anyone else to promote the establishment of commercial legal services on Army installations, this is included as an additional topic for consultation, should such plans be developed in the future. Any shortfalls in legal assistance, or in USATDS staffing or services, could result in a move to authorize the provision of commercial legal services on Army installations. During the 1992 Army Family Action Plan (AFAP) conference, one proposal recommended that the Army establish a “civilian legal affairs program” patterned after the installation child care services. Soldiers would pay fees on a sliding scale, based on income, for legal representation on nonmilitary legal actions that presently cannot be provided because of shortfalls in judge advocate staffing and membership in appropriate bars. The proposal was tabled based on input from the Legal Assistance Division, OTJAG, that the Army Legal Assistance Program provided a full range of legal services including, at some installations, *pro se* assistance and in-court representation. This input also pointed out that most legal matters are resolved without going to court and, most importantly, that “referral procedures and guidance presently in effect are the best and most cost-effective way to assist soldiers and families in finding civilian lawyers who will represent them in a competent manner for reasonable fees.” Information Paper, Office of The Judge Advocate General, U.S. Army, DAJA-LA, subject: AFAP Issue Paper on Judge Advocate General (JAG) Representation of Soldiers in Civilian Legal Actions (15 Oct. 1992).

<sup>264</sup> AR 27-3, *supra* note 1, para. 1-4g(7).

<sup>265</sup> *Id.* para. 2-1.

<sup>266</sup> AR 27-3 (1989), *supra* note 3, para. 2-8a.

<sup>267</sup> AR 27-3, *supra* note 1, para. 3-7g(2)(c). This was not authorized under the previous legal assistance regulation. See AR 27-3 (1989), *supra* note 3, para. 2-9b(f).

<sup>268</sup> See AR 27-3, *supra* note 1, para. 7g(2)(c), (d), (3). Some practitioners could interpret the guidance on limiting in-court representation in civil proceedings to “financial hardship” cases as not applying to civilian criminal proceedings before a United States magistrate. This interpretation, however, does not reflect the regulatory intent.

<sup>269</sup> *Id.* paras. 1-4g(5), 3-7g(1).

<sup>270</sup> *Id.* ch. 3, secs. II, III.

<sup>271</sup> DEP’T OF ARMY, REG. 600-14, PERSONAL GENERAL: PREVENTIVE LAW PROGRAM (30 Sept. 1965).

was incorporated in the previous legal assistance regulation.<sup>272</sup> AR 27-3 discusses preventive law as an important area in the Army Legal Assistance Program, but dispenses with much of the verbiage that was used to describe it in previous regulations.<sup>273</sup>

Preventive law is not peculiar to legal assistance, despite its close association with legal assistance in the past.<sup>274</sup> For government practitioners, preventive law is an effective method to practice law, whether the area of law is legal assistance, contract law, environmental law, claims, administrative law, or criminal prosecution. Preventive law saves time, effort, and expense by preventing problems instead of solving them.

AR 27-3 requires commanders to sponsor preventive law initiatives,<sup>275</sup> and makes them responsible for ensuring that preventive law services are provided in their commands.<sup>276</sup> SJAs, on the other hand, are required to seek "command support and involvement" on their own preventive law initiatives,<sup>277</sup> and are encouraged to be aggressive and innovative in their preventive law efforts.<sup>278</sup>

Preventive law remains an important area in the Army Legal Assistance Program. Keeping a client out of legal trouble is more important to a client than helping him or her with damage control after the mistake is made. AR 27-3 directs that the common legal problems of soldiers and their families be examined for ways in which those problems can be avoided, that regulatory or statutory "fixes" be recommended, and that these solutions be shared with other attorneys providing legal assistance.<sup>279</sup> AR 27-3 also requires that "[l]ocal print and electronic media and training and education programs" be used to inform soldiers and their families of their legal rights and entitlements; local legal problems and ways to avoid

them; and the location, telephone numbers, and hours of operation of the legal assistance office.<sup>280</sup>

### C. Client Services

1. *General.*—As reflected at Appendix B of this article, the new AR 27-3 breaks down legal assistance client services into ten separate types of services.<sup>281</sup> Each listed client service, except for ministerial services—such as witnessing signatures and providing notary services<sup>282</sup>—is a legal service separate and distinct from the others. This breakdown also makes each service easy to tabulate for the purpose of statistical reporting.

An attorney is expected to provide some legal counseling to every client he or she sees.<sup>283</sup> Nevertheless, the effectiveness of a particular attorney—and of the legal assistance office to which he or she is assigned—is measured not only by the number of clients counseled, but also by the number and types of other legal assistance services provided to these clients.

Under AR 27-3, these legal services include legal negotiation, which may be nothing more than a simple discussion of a client's problem with an opposing party or counsel.<sup>284</sup> This same service performed in writing, is legal correspondence.<sup>285</sup> Legal document preparation is another legal service, used broadly, to describe not only the drafting and review of wills and powers of attorney, but also the preparation of tax returns.<sup>286</sup> Legal document filing also is used broadly to describe the filing of legal documents with a court or other governmental body.<sup>287</sup> Two significant areas of legal assistance practice in this area are the electronic filing of income tax returns<sup>288</sup> and, to a lesser extent, the growing area of *pro se* assistance.<sup>289</sup>

<sup>272</sup> AR 27-3 (1989), *supra* note 3, chap. 4.

<sup>273</sup> Preventive law is no longer a program within a program. *Cf. id.*

<sup>274</sup> Although AR 27-1, *supra* note 72, para. 5-3, suggests that preventive law is limited to legal assistance, DRAFT REVISION TO AR 27-1, *supra* note 69, para. 5-3, clearly indicates that it is not so limited.

<sup>275</sup> AR 27-3, *supra* note 1, para. 1-4f(3).

<sup>276</sup> *Id.* para. 3-3a.

<sup>277</sup> *Id.* para. 1-4g(8).

<sup>278</sup> *Id.* paras. 1-4g(9), 3-3b.

<sup>279</sup> *Id.* para. 3-4a(1), (5).

<sup>280</sup> *Id.* para. 3-4b.

<sup>281</sup> *Id.* para. 3-7.

<sup>282</sup> *Id.* para. 3-7a.

<sup>283</sup> *Id.* para. 3-7b.

<sup>284</sup> *Id.* para. 3-7c.

<sup>285</sup> *Id.* para. 3-7d.

<sup>286</sup> *Id.* para. 3-7e.

<sup>287</sup> *Id.* para. 3-7f.

<sup>288</sup> *Id.* para. 3-7f(1).

<sup>289</sup> *Id.* para. 3-7f(2).

2. *Pro se Assistance and In-Court Representation.*—*Pro se* is defined as an appearance in court or other “proceeding by a person who represents himself or herself without the assistance of counsel during the proceeding.”<sup>290</sup> *Pro se* assistance is the help (short of in-court representation) provided by legal assistance attorneys “to non-lawyer clients to file legal documents, papers, or pleadings in civil proceedings, such as small claims or uncontested divorces.”<sup>291</sup>

In-court representation is defined as “Appearing, or providing notice of appearing, as counsel on behalf of a client in a military, civil, or civilian-criminal proceeding, or taking any action which constitutes or could require counsel to appear as the attorney of record in any proceeding.”<sup>292</sup> The definition of “in-court representation” is worded broadly to cover any legal assistance to a client that exceeds the scope of *pro se* assistance.<sup>293</sup> The definition includes military proceedings (both military justice and administrative); “civil proceedings” (non-criminal trials and administrative hearings conducted by a municipal, state, federal (outside DOD), or foreign judge or official); and “civilian-criminal proceedings” (criminal and quasi-criminal trials and hearings conducted by municipal, state, federal (outside DOD), or foreign judge or official).<sup>294</sup>

The in-court representation of clients in military justice proceedings is outside the scope of legal assistance.<sup>295</sup> As previously discussed, the in-court representation of clients in civilian-criminal proceedings, except before a United States magistrate on a military installation, is not authorized under AR 27-3.<sup>296</sup> The in-court representation of soldiers in military

administrative proceedings is authorized if approved by a supervising attorney, but these cases generally are handled by USATDS attorneys.<sup>297</sup> Accordingly, only *pro se* assistance and in-court representation in civil proceedings remain to be discussed.

*Pro se* assistance and in-court representation are two of the most valuable legal assistance services to clients because, for most legal problems and needs, either of these services eliminates a client’s need to hire a civilian lawyer. Each of these legal services—particularly in-court representation—has the added benefit of providing valuable training and experience to legal assistance attorneys, especially civilian attorneys employed by the Army who are authorized to practice law in the courts outside the installation. For this reason, in-court representation is not limited to civil proceedings within the United States, but includes those conducted in foreign courts as well.<sup>298</sup>

Nevertheless, *pro se* assistance and in-court representation also can be extremely time-consuming and, for that reason, these services should not be allowed to exhaust resources that are needed to provide more basic legal services to other clients.<sup>299</sup> These legal services also have the greatest potential to give judges, bar associations, and individual civilian lawyers cause to complain about the Army Legal Assistance Program.<sup>300</sup> The goal of the Army Legal Assistance Program is not to compete with lawyers in private practice or to irritate judges with *pro se* filings. For this reason, and to keep complaints from lawyers and judges to an absolute minimum,

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<sup>290</sup>*Id.* glossary.

<sup>291</sup>*Id.* para. 3-7f(2)(a). As a practical matter, *pro se* assistance does not occur outside of the United States, although AR 27-3 does not preclude it. *See id.* glossary. Nor does it occur in civilian criminal proceedings or in military justice or military personnel administrative proceedings.

<sup>292</sup>*Id.* glossary. The term “in-court representation” replaces the term “court representation,” which was used in the previous legal assistance regulation for grammatical reasons—that is, a legal assistance attorney “represents” a client, not a court. “Court representation” was not specifically defined. *See* AR 27-3 (1989), *supra* note 3, paras. 2-9, 2-10.

<sup>293</sup>*See also* AR 27-3, *supra* note 1, para. 3-7f(2) (providing, “*Pro se* assistance is not in-court representation”). In other words, if the legal assistance provided goes beyond *pro se* assistance, then it constitutes in-court representation. This broad definition is designed to prevent the disingenuous interpretations of an attorney who may have crossed the bounds of authorized assistance to a client. For instance, one legal assistance attorney claimed that he was not providing “court representation” in a particular divorce case because, although he filed an appearance and participated in a pretrial conference with opposing counsel and the judge, the judge never conducted an in-court hearing or trial at which the legal assistance attorney actually “represented” his client as counsel. *See* Professional Responsibility Notes, *Professional Responsibility Opinion No. 91-1*, ARMY LAW., Sept. 1992, at 50-53.

<sup>294</sup>*Id.* glossary.

<sup>295</sup>*Id.* para. 3-8a(1).

<sup>296</sup>*Id.* para. 3-6j; *supra* notes 265-269 and accompanying text.

<sup>297</sup> AR 27-3, *supra* note 1, para. 3-6g(4), (5); *supra* text accompanying note 244.

<sup>298</sup> SJAs located outside the United States may, if the requirements of AR 27-3 and applicable treaties and local laws are satisfied, authorize *pro se* assistance and in-court representation in foreign courts. For example, some German attorneys employed by Army legal assistance offices occasionally would like to represent a soldier in German court to obtain experience, or to provide enhanced legal assistance services for a particular client or category of cases. Regardless of the jurisdiction involved, the training derived from actually handling a case in court to its conclusion is invaluable. For example, the law governing divorce in a particular jurisdiction provides only a hint as to how divorces actually are handled by lawyers and judges in that jurisdiction.

<sup>299</sup> *See id.* para. 3-7g(1) (in-court representation).

<sup>300</sup> Few complaints about either of these legal services have arisen over the past several years. Recent complaints, however, have been limited to problems with *pro se* assistance. Accordingly, the restrictions on *pro se* assistance have been tightened and the limitations on in-court representation have been relaxed.

SJAs are required to coordinate their policies on both in-court and *pro se* assistance with local civilian judges, lawyers, and bar associations.<sup>301</sup>

Because supervising attorneys have been given the authority to authorize in-court representation or *pro se* assistance,<sup>302</sup> this authority has been accompanied by the responsibility—in the event that authorization is given—to document the coordination that occurred beforehand with local civilian judges and bar associations.<sup>303</sup> Supervising attorneys, keeping in mind “local sensitivities and concerns,” also are required to maintain and update records on this coordination and to maintain records on any complaints made and their resolutions.<sup>304</sup> This requirement ensures that the SJA or HQDA will have access to a file upon which to base a response, should anyone complain about *pro se* assistance or in-court representation at a particular installation.<sup>305</sup>

In-court representation in civil proceedings is limited to AC or RC soldiers “[f]or whom hiring civilian lawyers would entail substantial financial hardship to themselves or their families.<sup>306</sup> The determination on which soldiers meet this criteria is left to the discretion of supervising attorneys.<sup>307</sup> Supervising attorneys are directed to determine financial hard-

ship by “generally” considering the criteria followed by local governments in providing free legal representation to its citizens or, in the absence of such criteria or in foreign nations, to limit in-court representation to “soldiers in the pay grades of E4 and below.”<sup>308</sup> Although this criteria may appear harsh to some, the key is not the actual criteria applied at a particular installation, but whether that criteria has taken into account “local sensitivities and concerns” and has been coordinated with local courts and bar associations.<sup>309</sup>

The foregoing limitations on providing in-court representation only to soldiers in financial hardship cases does not apply to the assistance provided to the PNOK in the probate or settlement of estates involving soldiers who die while in a military duty status, to soldiers asserting their veterans’ reemployment rights under applicable federal and state laws,<sup>310</sup> or to abused (including neglected) children in family advocacy cases.<sup>311</sup> These limitations also do not apply to *pro se* assistance cases.<sup>312</sup> The coordination requirement however, applies to all *pro se* assistance and in-court representation cases.<sup>313</sup>

AR 27-3—unlike the previous legal assistance regulation—firmly states that, except for the two instances already noted, in-court representation is limited to soldiers only.<sup>314</sup> This

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<sup>301</sup> *Id.* para. 1-4g(5). For the first time, this requirement also covers *pro se* assistance. Cf. AR 27-3 (1989), *supra* note 3, para. 2-5b (directing compliance with “limits established by local court rules and practices”). Of course, given the nature of *pro se* filings, these “rules and practices” would not govern the activities of lawyers. In military communities where civilian “paralegals” and others perform services tantamount to the unauthorized practice of law, local judges and lawyers may raise fewer objections over military attorneys helping clients with *pro se* filings.

<sup>302</sup> AR 27-3, *supra* note 1, para. 3-7f(2)(a), g(1). The old AR 27-3 required SJA approval to accompany a client to court, but did not require such approval for other aspects of *pro se* assistance. See AR 27-3, *supra* note 3, paras. 2-5a(1), 2-6b. The previous regulation, however, required TJAG approval of any in-court representation service or “program.” See *id.* para. 2-10a(2), a(3), b(2)(b), c(2).

<sup>303</sup> AR 27-3, *supra* note 1, para. 1-4g(5).

<sup>304</sup> *Id.*

<sup>305</sup> Letters complaining about local legal assistance policies usually are addressed to local congressmen, the Secretary of the Army, or the Secretary of Defense. The absence of a record to support the local coordination that occurred prior to a challenged *pro se* or in-court representation could be embarrassing to TJAG and the responsible SJA, and could jeopardize those services throughout the Army.

<sup>306</sup> AR 27-3, *supra* note 1, para. 3-7g(2)(d).

<sup>307</sup> *Id.* para. 3-7g(3).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* para. 1-4g(5)(a).

<sup>310</sup> *Id.* para. 3-7f(2)(d). These exceptions are an outgrowth of legal assistance policies implemented during and following the Gulf War. See Message (5 Mar. 1991), *supra* note 50; *supra* notes 106, 227-233, and accompanying text. An RC soldier trying to recover the job he or she lost during deployment almost always will encounter some financial hardship. See AR 27-3, *supra* note 1, para. 3-5e(2) (the Chief, Legal Assistance Division, OTJAG, retains sole authority for authorizing in-court representation in a reemployment rights case pursued under federal law).

<sup>311</sup> AR 27-3, *supra* note 1, para. 3-7f(2)(d); see Message (5 Mar. 1991), *supra* note 50 (authorizing legal assistance, including in-court representation, to appoint guardians for minor children who were without parents following the Gulf War). The financial hardship of a minor in an abuse or neglect case is presumed. See DEP’T OF ARMY, REG. 608-18, PERSONAL AFFAIRS: THE ARMY FAMILY ADVOCACY PROGRAM, para. 1-6j(13) (1987) (authorizing SJAs to appoint legal counsel to represent the interests of abused and neglected children, and “[w]hen local practice permits[,] . . . interface with local authorities, to include court appearances”).

<sup>312</sup> AR 27-3, *supra* note 1, para. 3-7f(2)(a).

<sup>313</sup> *Id.* para. 1-4g(5).

<sup>314</sup> Compare *id.* para. 3-7g(2)(d)1 with AR 27-3 (1989), *supra* note 3, para. 2-9b(1)(b), (c) (“limit[ing]” in-court representation to “qualified active duty clients” and to other eligible clients as allowed by the SJA on a “case-by-case” basis).

restriction is driven both by resources and policy. The resource reasons are obvious; the policy reasons are less so. The previous legal assistance regulation "generally" evidenced a preference for limiting in-court representation to soldiers to prevent a legal assistance attorney "from representing a family member who is pursuing a legal action against an active duty soldier."<sup>315</sup> This policy is based on several important reasons. The primary focus of the legal assistance program is soldier readiness, morale, discipline and retention.<sup>316</sup> In addition, providing a reasonable explanation to soldiers who complain that they cannot obtain in-court representation in actions against their spouses, when their spouses have been successful in obtaining in-court representation from legal assistance attorneys against them from the same or a different installation, is very difficult.<sup>317</sup>

Finally, special provisions apply to RC judge advocates. All RC judge advocates must obtain the approval of their supervising attorneys (or the Chief, Legal Assistance Division, OTJAG, if not assigned to a USAR TPU or the ARNG) to provide *pro se* assistance.<sup>318</sup> All RC judge advocates must obtain the approval of their supervising attorney (if assigned to a USAR TPU or to the ARNG) and the Chief, Legal Assistance Division, OTJAG, before they may provide in-court representation to a client.<sup>319</sup> Two reasons exist for these requirements. First, HQDA must be able to track these cases and fix responsibility for them should an inquiry arise on the manner in which they were handled. Secondly, providing representation for RC soldiers at military administrative hearings occasionally requires coordination with USATDS.

3. *Legal Referrals and Providing Lists.*—Legal assistance includes any help provided by an attorney to a client in obtaining the legal services of another. Given the limited scope of the Army Legal Assistance Program, this is one of the most valuable legal services provided by legal assistance attorneys, and yet, it is one of the most neglected. Any failure on the

part of legal assistance attorneys to provide meaningful help in this area likely will result in others on the installation, such as commanders, family advocacy personnel, and nurses, filling the void by making their own recommendations on civilian lawyers. The failure to do better in this area also could result in an AAFES effort to bring private law firms on Army installations in much the same way AAFES brought commercial tax preparers on the installation.<sup>320</sup>

AR 27-3 encourages by-name referrals more than the previous legal assistance regulation.<sup>321</sup> AR 27-3, for the first time, distinguishes a by-name referral for a client from providing a client with a list of civilian lawyer's names—including just the name of one lawyer. A referral may be to a military attorney or a civilian lawyer, or to any military or civilian office that may be of assistance to the client, such as a local ACS office, inspector general, or consumer protection office.<sup>322</sup> A referral presupposes that a legal assistance attorney has communicated with the party to whom the client is being referred *before* making the actual referral. Providing a list of civilian lawyers or the telephone number of a lawyer referral office or other office is not a referral; it is, at best, a suggestion to a client on a possible course of action.<sup>323</sup> Providing lists is discouraged unless that is all the client desires.<sup>324</sup>

AR 27-3 directs that clients be assisted whenever possible without referral or providing lists. Referrals should be made only when they are required by AR 27-3—or by supervising attorneys as in a policy letter—and when they are in the best interest of the client.<sup>325</sup>

AR 27-3 directs that legal assistance attorneys consider the following before referring a client to a military attorney or to a civilian lawyer, or providing a client a list of civilian lawyers:

(1) Their own workloads.

<sup>315</sup> AR 27-3 (1989), *supra* note 3, para. 2-9b(1)(b).

<sup>316</sup> *Id.* para. 2-1b.

<sup>317</sup> The certainty of complaints in such cases is a check against a legal assistance attorney exceeding the limits of *pro se* assistance on behalf of a family member.

<sup>318</sup> AR 27-3, *supra* note 1, para. 3-7f(2)(a); *id.* glossary.

<sup>319</sup> *Id.* para. 3-7g(1).

<sup>320</sup> See *supra* notes 261-264 and accompanying text.

<sup>321</sup> Compare AR 27-3, *supra* note 1, para. 3-7h, *i* with AR 27-3 (1989), *supra* note 3, para. 2-7b(2) (indicating that "[legal assistance attorneys] can significantly benefit their clients by assisting them in obtaining the best-qualified [sic] counsel at the most reasonable cost").

<sup>322</sup> AR 27-3, *supra* note 1, para. 3-7h(1), (6). Although subparagraph h(6) can be interpreted to mean a referral includes providing a client the telephone number of a lawyer referral office, it actually does not. Providing a telephone number of a lawyer referral office is counted, for statistical purposes, as "providing lists." See *id.* para. 3-7i(2); *id.* app. B-4c(2)(l).

<sup>323</sup> *Id.* para. 3-7h(6), h(7), *i*.

<sup>324</sup> *Id.* para. 3-7i.

<sup>325</sup> *Id.* para. 3-7h(2).

(2) Their areas of expertise compared to the expertise of the attorney receiving the referral.

(3) The goals or interests of the client.

(4) The convenience to the client.

(5) The cost to the client.<sup>326</sup>

AR 27-3 also indicates the following order of preference on making referrals to military attorneys and civilian lawyers:

(1) An attorney in the same Army legal office.

(2) An attorney in another Army legal office, such as a USATDS branch office.

(3) An attorney in another Army or military legal office of the same or different component.

(4) A civilian lawyer on a no-fee basis.

(5) A civilian lawyer on a reduced-fee basis.

(6) A civilian attorney whose fees are reasonable in the locale in which assistance is required.<sup>327</sup>

Before making a referral to a particular civilian lawyer, particularly to one in the local community outside the installation, the legal assistance attorney is expected to have some knowledge about the lawyer's background, areas of legal expertise, legal malpractice insurance coverage, standing with the local bar disciplinary body, and "ability to meet the specific needs of the client."<sup>328</sup> A legal assistance attorney also can

negotiate a fee on behalf of the client, and express a personal opinion about the ability of the lawyer to whom the client is being referred.<sup>329</sup> The legal assistance attorney however, should "make it clear . . . that any decision to consult with the lawyer is solely that of the client and that the client is free to retain any lawyer."<sup>330</sup>

The *JAGC Reserve Officer Legal Assistance Directory* also can be used to refer a client to an RC judge advocate who has agreed to accept the referral. An RC judge advocate can accept the referral in his or her capacity as an RC judge advocate, in which case no fee for professional services may be charged. The mere fact that an RC judge advocate is listed in the directory, however, does not preclude him or her from accepting a referral when a fee for professional services will be charged.<sup>331</sup> In these instances the client must understand fully that the referral is for a fee and that the RC judge advocate is accepting the client's case in a private, nonofficial capacity.<sup>332</sup>

Finally, supervising attorneys are required to monitor the number and type of referrals to ensure that clients are being helped as fully as possible, and to determine the need for additional training, supervision, or other actions.<sup>333</sup> This review also should include a check on whether any "appearance of favoritism" has arisen in the referrals made to civilian lawyers in which any fee for professional services will be charged.<sup>334</sup> Such an "appearance" occurs when repeated referrals in these cases are made to the same lawyer or an "unreasonably limited number of lawyers, or to those lawyers only listed in the *JAGC Reserve Officer Legal Assistance Directory*."<sup>335</sup>

4. *Mediation.*—Mediation was added as an additional legal assistance service, following formal staffing of AR 27-3, based on comments received that mediation is used at some Army installations to settle disputes. Mediation services may be provided as part of a formal program authorized by the commander responsible for the legal assistance program.<sup>336</sup> Attorneys providing mediation services must comply with the

<sup>326</sup>*Id.* para. 3-7h(3).

<sup>327</sup>*Id.* para. 3-7h(7).

<sup>328</sup>*Id.* para. 3-7h(8).

<sup>329</sup>*Id.* para. 3-7h(3)(e), h(9).

<sup>330</sup>*Id.* para. 3-7h(9). Referrals, like other legal assistance services, raise some concerns about the government's exposure to liability for legal malpractice. The malpractice of a civilian lawyer to whom a referral is made, however, is not likely to expose the government to liability because no agency relationship has arisen. Liability on the part of the government arising from a referral is a remote possibility given the exercise of care that AR 27-3 requires in making a referral and, more importantly, the absence of any fee being earned by the government as a result of the referral. See generally Rolwes, *Avoiding the Pitfalls in Attorney Referrals*, 80 ILL. BAR J. 242 (1992).

<sup>331</sup> AR 27-3, *supra* note 1, paras. 3-7h(8), 4-5e.

<sup>332</sup>*Id.*

<sup>333</sup>*Id.* para. 3-7h(4).

<sup>334</sup>*Id.* para. 3-7h(8).

<sup>335</sup>*Id.*

<sup>336</sup>*Id.* para. 3-7j.

applicable ethical standards of AR 27-26,<sup>337</sup> and may mediate any dispute involving one or more eligible legal assistance clients.

## XV. Ethical Standards

The primary source on the rules of professional conduct is AR 27-26, not AR 27-3.<sup>338</sup> A conscious effort was made, whenever possible, not to restate any of the rules of professional responsibility, or the comments thereto, in AR 27-3. To the extent that any restatement appears, the wording of AR 27-26 governs.<sup>339</sup>

AR 27-26 indicates that "Army lawyers working in the same Army law office are not automatically disqualified from representing a client because any of them practicing alone would be prohibited from doing so" because of a conflict of interest.<sup>340</sup> The comment to this rule, however, indicates that "Army policy discourages representation by one *legal assistance office* of both spouses involved in a domestic dispute."<sup>341</sup> Although this comment correctly stated legal assistance policy at the time of publication—1 May 1992<sup>342</sup>—that policy is modified by AR 27-3. AR 27-3 now "discourages attorneys from the same *legal office* from providing legal assistance to both spouses involved in a domestic dispute."<sup>343</sup> Supervising attorneys, however, are given broad discretion to authorize exceptions if approved by the client and if precautions are followed in using different clerical personnel and separate records and file locations.<sup>344</sup> This change is based on the fact that AR 27-3 authorizes all Army attorneys to provide legal assistance and little reason exists to distinguish attorneys

in a legal assistance office from those elsewhere in an Army legal office.<sup>345</sup>

Finally, AR 27-3 provides particular guidance to RC attorneys.<sup>346</sup> RC attorneys may not receive a fee for performing legal assistance duties or later represent a legal assistance client in a private capacity for a fee for the same general matter previously discussed with the client.<sup>347</sup> AR 27-3 defines "the same general matter" to include "one or more types of cases within any one of the ten categories of cases listed within paragraph 3-6, or which arises out of the same factual situation or course of events."<sup>348</sup> This means that an RC judge advocate who provides legal assistance to a client on a divorce cannot later charge the same client for legal services provided on a child custody or support issue related to that divorce.<sup>349</sup> The prohibition is designed to ensure that no one providing legal assistance receives any actual or constructive compensation or benefit from performing official Army duties.<sup>350</sup>

## XVI. Records and Statistics: Legal Automation Army-Wide System—Legal Assistance

A great deal of time and effort is devoted by attorneys and support staff at each Army installation and at HQDA in maintaining client cards, collecting data from these cards, consolidating these data into reports, publishing these reports, and reviewing and analyzing these reports. Unless these reports produce meaningful and useful data however, any analysis is not going to result in any meaningful findings, and the energy involved in collecting these data will be wasted.

<sup>337</sup>*Id.*; AR 27-26, *supra* note 40, app. B, rule 2.2.

<sup>338</sup>See AR 27-3, *supra* note 1, para. 4-7a.

<sup>339</sup>Compare *id.* para. 4-7 (ethics); *id.* para. 4-8 (attorney-client privilege); and *id.* para. 4-9 (conflict of interest) with AR 27-26, *supra* note 40, app. B, rule 1.1 (competence); *id.* rule 1.2 (scope of representation); *id.* rule 1.5 (fees); *id.* rule 1.6 (confidentiality of information); *id.* rules 1.7 to 1.9 (conflict of interest); and *id.* rule 1.10 (imputed disqualification).

<sup>340</sup>AR 27-26, *supra* note 43, app. B, rule 1.10.

<sup>341</sup>*Id.* comment (emphasis added).

<sup>342</sup>AR 27-3 (1989), *supra* note 3, para. 2-5a(1).

<sup>343</sup>AR 27-3, *supra* note 1, para. 4-9c (emphasis added).

<sup>344</sup>*Id.*; AR 27-26, *supra* note 43, app. B, rule 1.10, comment.

<sup>345</sup>*Id.* app. B, rule 1.2, comment ("Formation of attorney client relationships and representation of clients by Army lawyers is permissible only when authorized by competent authority"). As to legal assistance, AR 27-3 provides that authority. See *supra* notes 71-75 and accompanying text.

<sup>346</sup>This guidance is not limited to RC judge advocates because AC judge advocates and DA civilian attorneys may request TJAG approval to engage in the private practice of law while off duty. See AR 27-1, *supra* note 72, para. 4-3e.

<sup>347</sup>AR 27-3, *supra* note 1, para. 4-3d.

<sup>348</sup>*Id.* para. 4-3d(2).

<sup>349</sup>*Id.*; *id.* para. 3-6a; cf. *id.* para. 3-6b (will and subsequent probate action); *id.* para. 3-6c (lease and subsequent sale of the same property).

<sup>350</sup>AR 27-26, *supra* note 43, app. B, rule 1.5, comment. An RC judge advocate also is prohibited from referring such "follow-on" cases to members of his or her own law firm or accepting a referral fee from another law firm. See AR 27-3, *supra* note 1, para. 3-6d(2).



Why does AR 27-3 require offices to collect statistics? One reason is to be able to answer questions accurately—particularly from those at the installation or at HQDA who may wish to cut back or provide resources to the legal assistance program. Having statistics to answer the following three questions is essential: Whom did legal assistance attorneys serve? What problems did these clients have? What did legal assistance attorneys do for these clients? In addition, statistics are indicative of staffing and training requirements. Finally, statistics assist in evaluating the performance of individual attorneys and legal offices. Unfortunately, the statistics collected in the past have not been of much value.<sup>351</sup>

One of the goals in revising the previous legal assistance regulation was to bring some sense and order to the statistics collected and published through the Army Legal Assistance Program. Much of the legal assistance data previously collected and published best can be described as a “garbage-in, garbage-out” process from a statistical point of view.

The previous legal assistance regulation failed to discuss, or even mention, the old “Legal Assistance Operations” report, much less provide any guidance on how cases and services should be counted.<sup>352</sup> This report reflected the number of “visits” made by clients, as opposed to the number of cases handled for clients. For example, an attorney assisting a client over the course of several weeks on a continuing marriage problem in which the attorney answers questions on divorce, child support, child custody and visitation, and service of process might count each “visit” by that client as a “divorce/separation” visit, or as one of the following five types of visits: “divorce/separation,” “adoption/custody,”<sup>353</sup> “nonsupport,” “civilian court matter,” and “SSCRA.”

The more “visits” the client has to make to get his or her legal problem or need resolved, the higher the statistics for that attorney and the command to which the attorney is assigned—as well as an exaggeration of the number of clients of that particular military grade or other category. Because

published guidance existed, an attorney also might count a telephone call as a visit, or a telephone call as a number of visits, depending on the subjects discussed. On the other hand, if the attorney prepared a separation agreement or provided *pro se* assistance or in-court representation for the client, no separate place on the report was made to reflect this. Therefore, much of the data collected were useless. The number of visits made by clients means very little in the absence of data—much of which was not collected—as to the number of clients being assisted, the number and type of legal problems being handled, and the type of legal services being provided.

The new “client card”<sup>354</sup> and “legal assistance report”<sup>355</sup> were designed during the course of drafting AR 27-3 and were coordinated as to both content and format with LAAWS personnel and the United States Army Publications and Printing Command, which is responsible for printing and publishing DA forms and regulations. The coordination occurred over the course of several weeks and was designed to ensure that the forms, the LAAWS-LA program, and the draft copy of AR 27-3 were consistent in every respect and, with regard to LAAWS-LA, that the data being collected were capable of being reported in the formats desired.

LAAWS-LA implements the record-keeping and reporting requirements of AR 27-3 throughout the active Army.<sup>356</sup> AR 27-3 contains explicit directions on how cases and services are to be counted and tabulated on both the client card and legal assistance report.<sup>357</sup> Individual two-letter codes are used to designate each possible reason for legal assistance—office setting, readiness exercise, deployment—each possible type of “case” that may be handled, and each possible type of legal assistance service that may be provided.<sup>358</sup> These codes are used to record data on the client card, either manually or by using LAAWS-LA. Both the client card and the legal assistance report can be printed manually or computer generated. An example of a manually completed client card is reproduced at figure B-1 of AR 27-3.

<sup>351</sup> One indication of the lack of value of past legal assistance statistics is that, although Army Legal Assistance Program statistics for calendar year 1991 were collected and consolidated, they never were published. Moreover, no one ever asked where they were or why they were not published.

<sup>352</sup> The report was computer generated using the LAAWS-LA, but never published as an official DA form.

<sup>353</sup> Even the grouping of the categories did not make sense. A major command recently inquired about the number of soldiers in that command who received assistance on adoptions. The answer to this simple question could not be answered—not even an educated guess could be made. The statistics showed only the number of times clients “visited” attorneys to seek legal assistance on adoptions or child custody matters—two areas that are not closely related.

<sup>354</sup> Dep’t of Army, DA Form 2465, Client Legal Assistance Record (July 1992); AR 27-3, *supra* note 1, para. 5-2, app. B, tbl. B-1, fig. B-1.

<sup>355</sup> Dep’t of Army, DA Form 4944-R, Report on Legal Assistance Services (July 1992); *see* AR 27-3, *supra* note 1, para. 5-3, app. B, tbl. B-1 (Reproducible Forms).

<sup>356</sup> AR 27-3, *supra* note 1, para. 5-3b. RC legal offices are not required to submit a DA Form 4944-R to HQDA; however, if they submit any reports, this form—and no other—will be used. *See id.* (“local forms and reports on legal assistance matters are prohibited without approval from HQDA”). The purpose of these provisions was to address DSAT issue 189, which indicated that RC judge advocates were burdened by duplicious reporting requirements during Desert Storm—requirements that often asked for the same information in different formats. Although no requirement to do so yet exists, RC Army legal offices and individual RC judge advocates who provide legal assistance for retirement points are encouraged to use these forms. Actually, DA Form 4944-R was designed with this purpose in mind, and implementing a requirement to submit them only has been delayed to review the results of using the form in the active Army.

<sup>357</sup> AR 27-3, *supra* note 1, app. B.

<sup>358</sup> *Id.* tbl. B-1.

Using LAAWS-LA, supervising attorneys now can produce computer-generated legal assistance reports that provide the following information:

a. Data on all legal assistance "cases" by category of client, broken down by military rank, when applicable.<sup>359</sup>

b. Data on all preventive law and client services.<sup>360</sup>

c. A break-down of legal assistance cases, including client categories and client services, by time period; by attorney; or by unit (assuming a standard code or name is used to designate each unit—preferably large unit or subinstallation—tracked in block 10 of the DA Form 2465).

The guidance provided in AR 27-3, as incorporated in LAAWS-LA, will facilitate the collection of meaningful legal assistance data and the production of better legal assistance reports. This, in turn, will help supervising attorneys at every level to provide more accurate answers to the three important questions mentioned above: Whom did we serve? What problems did they have? What did we do for them? These answers should be available in the future, whether the questions are focused on a particular attorney, a certain unit, a particular legal assistance office, a major command, or the Army as a whole.

## XVII. Conclusion

The world, like the Armed Forces, is in a period of transition. The Army, faced with budget and manpower reductions, is undergoing a so-called "build-down." Fortunately, the build-down process likely will not have considerable adverse effect on long-standing, relatively inexpensive, but necessary programs such as legal assistance.

SJAs and commanders, however, must continue to place emphasis on the importance of legal assistance. They must continue to provide a wide range of quality legal services to great numbers throughout the world, often on short notice, taking into account all the laws of the various jurisdictions in which clients are domiciled or reside. At the same time, their records and reports accurately must depict what their attorneys are doing for soldiers and their families, and they must keep commanders informed about the accomplishments and needs of their legal assistance programs.

The new AR 27-3 provides additional flexibility to AC and RC commanders and supervising attorneys in providing legal assistance services in their commands. The differences between the old AR 27-3 and the new one are significant compared to past regulatory changes made to the Legal Assistance Program. The basic structure of the Legal Assistance Program, however, has endured. Although great changes have occurred in the world and in the Army over the last fifty years, the Army Legal Assistance Program continues to be a commander's program; a program mandated not by law, but by military needs; and a program in which judge advocates and civilian attorneys provide valuable legal services, free of charge, to soldiers and their families.

<sup>359</sup>The directions in the appendix to AR 27-3 and in the LAAWS program should prevent "each visit" from being counted as a separate case. For example, the DA Form 2465 of "Private First Class (PFC/E-3) Johanne Coleman" portrayed at figure B-1 of AR 27-3 reflects that she made 13 "visits" to a legal assistance office over two calendar years—nine in 1993 and four in 1994. Note that the two "mode" entries of 13 September 1993 pertain to only one "visit" and would be counted as only one visit in Part II of the DA Form 4944-R when using the LAAWS-LA program. The 1993 report, however, would reflect only five cases involving an E-3: (1) income tax, (2) wills/SGLI, (3) divorce/separation, (4) real property for tenant, and (5) report of survey. The 1994 legal assistance report would reflect only two cases involving an E-3: (1) civilian criminal and (2) change of name. A particular type of case carried from one year to the next does not become a "new" case with the turn of a calendar page. In the example, PFC Coleman's assistance over two years on income tax is not reported as two E-3s assisted on income tax. Rather, only one E-3 was assisted on income tax. The same would be true for other categories of cases, such as bankruptcy or adoptions.

<sup>360</sup>See *id.* During the 13 "visits" to a legal assistance office, PFC Coleman received 34 separate legal services—26 in 1993, and eight in 1994. Each legal service would appear on the legal assistance report for the calendar year in which that particular legal service was provided. In the example given, the 34 legal services would be reported as follows:

Legal Service	1993	1994
Legal counseling	10	3
Federal income tax prepared	2	1
State income tax prepared	2	1
Federal return electronically filed	1	1
Power of attorney	2	
Assistance on a will	2	
Assistance on a SGLI form	1	
Negotiation on behalf of client	1	1
Assistance on a separation agreement	1	
Referral to a civilian lawyer on a fee basis	1	
Provided a list of civilian lawyers	1	
Assistance on other legal documents	2	
Pro se assistance		1
TOTAL	26	8

Because almost every legal service is accompanied by legal counseling, the figures reported for legal counseling should closely approximate what formerly were reported as "visits."

## APPENDIX A

### RESPONSIBILITIES OF STAFF JUDGE ADVOCATES AND OTHER SUPERVISING ATTORNEYS UNDER AR 27-3, ARMY LEGAL ASSISTANCE PROGRAM

AR 27-3 PARAGRAPH NUMBERS	RESPONSIBILITIES
<i>Relating to the Commander</i>	
1-4f(2) & g(7)	Consult with commander regarding commercial tax services on the installation.
1-4g(6)	Invite commander to view legal assistance facilities.
1-4g(8)	Seek command support on legal assistance initiatives.
3-3b & 3-4a	Assist commander on preventive law responsibilities.
3-6i(1)	Seek command support to appoint unit tax advisors and to recruit volunteers for preparing and filing income tax returns for soldiers and other eligible legal assistance clients.
4-6a	Act on behalf of a command or a legal office in pursuing relief for a particular legal assistance client when the commander and client so authorize.
<i>Relating to Management</i>	
1-4g	Exercise responsibility for the operation of the Army Legal Assistance Program.
1-4g(1)	Establish local legal assistance policies.
1-4g(2)	Establish limitations, when appropriate, on who may provide legal assistance.
1-4g(3)	Authorize temporary variations from AR 27-3 policies and procedures, and provide notice of same to HQDA.
1-4g(4)	Supervise legal assistance, and review office procedures and correspondence.
1-4g(5)	Coordinate legal assistance policies, including <i>pro se</i> assistance and in-court representation, with local authorities and bar.
1-4g(9) & (12)	Encourage innovation and automation in legal assistance services.
1-4g(10) & 2-4a	Provide training on AR 27-3, AR 27-26, and local legal assistance policies.
1-4g(11)	Use a "total Army approach" in providing legal assistance during war and national emergencies.
2-2a(7)	Supervise attorneys qualified under foreign law to provide legal assistance outside the United States.
2-2b(4)	Perform the initial certification of legal assistance work for retirement points. (RC supervising attorney and Chief, Legal Assistance Division, only).
2-4c	Use RC judge advocates to provide legal assistance.
3-6i(2)	Supervise all tax services on the installation except those provided by commercial tax preparers.
3-7h(4)	Monitor referrals to determine the need, if any, for additional training, or for the need to discontinue or consolidate legal assistance programs.

*Relating to Management (Con't)*

- 3-8a & 1-4g(3) Authorize, when appropriate in a particular case, legal advice on a matter outside the scope of legal assistance.
- 3-8a(3)(b) Request TJAG approval before authorizing in-court representation in a civil lawsuit arising from a legal assistance case in which the United States has an interest.
- 4-3e Provide clear guidance to all volunteers on the need to protect from disclosure all the communications and records protected by the attorney-client privilege.
- 4-7d Take appropriate action on any report received regarding the receipt of any benefit or gratuity relating to the performance of AR 27-3 duties.
- 4-8c Review all office administrative activities and procedures and, as appropriate, incoming and outgoing legal assistance correspondence.
- 4-9b Establish procedures to screen clients to avoid inadvertent conflicts of interest; to provide full explanations to, and referral procedures for, clients who cannot be assisted because of a conflict of interest; and to protect the confidentiality of attorney-client communications.
- 4-9c Provide guidance on domestic relation cases and issues involving imputed disqualification, and, when appropriate, authorize exceptions to the policy in accordance with AR 27-3 procedures.
- 5-1c Establish procedures to dispose of temporary client files and determine what other matters are filed, saved for future reference, or destroyed.

*Relating to Client Services*

- 1-4g(2), 3-5c & 3-6g(1) Determine the limitations, if any, to impose on cases and services in which legal assistance is "optional"—that is, when legal assistance may be declined because available resources, personnel, or expertise are insufficient to provide the assistance needed.
- 1-5 & 2-6 Request authority, when necessary, from or through the commander responsible for legal assistance services, to limit or deny legal assistance to certain clients or categories of clients, or to limit legal assistance to certain types of cases or certain types of services.
- 2-5a(2)(b) Determine the limitations, if any, to impose on the legal assistance provided to—  
—RC members who are on active duty for periods of 29 days or less.  
2-5a(3) —RC members by RC attorneys (RC supervising attorneys only).  
2-5a(7) & glossary —DA civilian employees designated as "mission essential" or "emergency essential." (The former are so designated by the SJA).
- 3-7f(2)(a) Determine whether to authorize *pro se* assistance and, if so, whether to do so on a case-by-case basis or for certain categories of cases.
- 3-7g(1)(a) & (3) Determine whether to authorize in-court representation and, if so, whether to do so on a case-by-case basis or for certain categories of cases. If authorized, also determine whether a client satisfies the financial hardship test on a case-by-case basis. (RC judge advocates not on active duty also must receive approval from the Chief, Army Legal Assistance Division).

## APPENDIX B

### LEGAL ASSISTANCE CASES AND SERVICES

CASE CATEGORY	REQUIRED	OPTIONAL	OUTSIDE THE SCOPE OF LEGAL ASSISTANCE
Family law	Marriage Legal separation Annulment Divorce Financial nonsupport Paternity Child custody	Adoption	
Estates	Wills Testamentary trusts for minors Guardianships Designations of life in- surance and SGLI beneficiaries Health care directives -Living wills -Powers of attorneys -Anatomical gift designations	<i>Inter vivos</i> trusts	
Real property	Lease issues and disputes on principal residence	Purchase and sale of principal residence	Private business activities
Personal property	All consumer affairs issues	Sale or leasing of client's property	
Economic	Bankruptcy Debtors on loans Banking problems Credit cards Insurance SSCRA VRRL	Creditors on loans	Government and civil- ian employment -Hiring -Adverse personnel actions -Unemployment benefits -Workers' compensation
Civilian administrative	Notarizations	Name changes Immigration Naturalization Welfare assistance Civilian driving privileges	
Military administrative	Line of Duty Reports of survey OERs/NCOERs Reliefs for cause Memoranda of reprimand Article 138 complaints IG and other investigations Hardship discharges Compassionate reassignments Corrections of military records	Bars to reenlistment Waivers to allow reenlistment Security clearance revocations on military personnel Suspensions of favorable person- nel actions Expungements of military records Physical evaluation boards Flying evaluation boards Quality accreditations for doctors Medical evaluation boards Qualitative Management Program Military driving privileges	USATDS cases -Officer eliminations -Enlisted separations -Reductions in grade -Recruiter misconduct

<b>CASE CATEGORY</b>	<b>REQUIRED</b>	<b>OPTIONAL</b>	<b>OUTSIDE THE SCOPE OF LEGAL ASSISTANCE</b>
Torts	Invoking SSCRA protections		Contingent legal fee cases Litigation against the United States
Taxes	Real estate Personal property Federal income State income	Electronic filing of income tax returns Inheritance taxes Estate taxes Gift taxes Appealing tax rulings	Private business activities
Civilian criminal matters	No requirements	In-court representation before U.S. Magistrate on a military installation	All other in-court representation

<b>SERVICE CATEGORY</b>	<b>REQUIRED</b>	<b>OPTIONAL</b>	<b>OUTSIDE THE SCOPE OF LEGAL ASSISTANCE</b>
Ministerial services	Witnessing signatures Notarizations		
Legal counseling	Whenever necessary in required cases		
Legal correspondence	Whenever necessary in required cases		
Legal negotiation	Whenever necessary in required cases		
Legal document preparation	Whenever necessary in required cases	Prenuptial agreements Separation agreements <i>Inter vivos</i> trusts	
Legal document filing	No requirements	Electronic filing of income tax returns <i>Pro se</i> assistance	<i>Pro se</i> assistance not authorized by a supervising attorney
In-court representation authorized	No requirements		In-court representation not authorized by a supervising attorney
Legal referral	Whenever necessary or appropriate in required or optional cases		
Providing a list of lawyers	As a secondary alternative to referral whenever necessary or appropriate in required or optional cases		
Mediation	No requirements		Mediation not authorized by a supervising attorney

# USALSA Report

United States Army Legal Services Agency

## Clerk of Court Note

### Court-Martial Processing Times The Bad News and the Good

Court-martial processing times for the first quarter of fiscal year 1993 (October-December 1992) are shown below. Compared to Army-wide average processing times for fiscal year 1992, general courts-martial processing times increased twelve percent (pretrial and post trial processing combined) while similar processing times for special courts-martial empowered to impose a bad-conduct discharge (BCD) increased ten percent. Nine jurisdictions displayed average posttrial processing times in excess of 100 days.

As reported in the December 1992 issue of *The Army Lawyer*, Army-wide averages already had climbed thirty-seven percent in the past two years.

Notwithstanding these gloomy comparisons, signs of improvement exist—although seeing a difference may take up to two quarters. Some jurisdictions have worked to reduce their backlogs of cases tried ninety or more days before, reducing by half the total number of “over-ninety-day” cases not yet forwarded for appellate review. Many of those older

cases, however, will have arrived in the Clerk of Court's office during the January to March quarter, possibly pushing the Army-wide averages even higher. Mr. Fulton.

### General Courts-Martial

	FY 93/1stQ
Records received by Clerk of Court	319
Days from charging or restraint to sentence	61
Days from sentence to action	79
Days from action to dispatch	9
Days from dispatch to receipt by the Clerk	9

### BCD Special Courts-Martial

Records received by Clerk of Court	65
Days from charging or restraint to sentence	41
Days from sentence to action	72
Days from action to dispatch	8
Days from dispatch to receipt by the Clerk	8

## TJAGSA Practice Note

Faculty, The Judge Advocate General's School

### Contract Law Note

#### “Blanket Acknowledgement” of Amendments Revisited

The government, when using sealed bidding procedures, may award a contract only to the bidder whose bid satisfies

the essential requirements of the Invitation for Bids (IFB).<sup>1</sup> Generally, the IFB's essential requirements relate to price,<sup>2</sup> quantity,<sup>3</sup> quality,<sup>4</sup> or delivery.<sup>5</sup> The government must reject, as nonresponsive, any bid that fails to conform to these essential requirements.<sup>6</sup>

<sup>1</sup> 10 U.S.C. § 2305(b).

<sup>2</sup> GENERAL SERVS. ADMIN. ET. AL., FEDERAL ACQUISITION REG. 14.404-2(d)(e)(f) (1 Apr. 1984) [hereinafter FAR]; Reid & Strickland Co., B-239700, Sept. 17, 1990, 90-2 CPD ¶ 222 (ambiguous notation on bid).

<sup>3</sup> Inscom Elec. Corp., B-225221, Feb. 4, 1987, 87-1 CPD ¶ 116 (bidder's bid limited the government right to reduce quantity under the IFB).

<sup>4</sup> FAR, *supra* note 2, at 14.404-2(c); Wyoming Weavers, Inc., B-229669.3, June 2, 1988, 88-1 CPD ¶ 519.

<sup>5</sup> FAR, *supra* note 2, at 14.404-2(c); Pierce Mfg., B-224007, Oct. 28, 1986, 86-2 CPD ¶ 483.

<sup>6</sup> FAR, *supra* note 2, at 14.301(a); *Id.* at 14.404-2.

Some requirements, however, are "essential" even though they do not appear to relate to price, quantity, quality, or delivery. For example, the minimum bid acceptance period<sup>7</sup> is a material solicitation requirement because it affects the bidder's price.<sup>8</sup> The General Accounting Office (GAO) has found that an offeror who is permitted to specify a shorter acceptance period than allowed by the IFB would enjoy an unfair competitive advantage because the offeror could (1) refuse an award after its bid acceptance period expired if it no longer wanted the award,<sup>9</sup> or (2) extend its bid acceptance period after competing bids had been exposed.<sup>10</sup> Therefore, the materiality requirement includes the minimum bid acceptance period to ensure that all bidders assume the same business risks of leaving their bids open for government acceptance for the same amount of time.<sup>11</sup> Correspondingly, the government also may not waive the bid acceptance period because it affects the bidder's price.<sup>12</sup> Accordingly, the government must reject any bid that fails to provide an unequivocal minimum bid acceptance period as ambiguous and nonresponsive.<sup>13</sup>

In *Alaska Mechanical, Inc.*<sup>14</sup> (AMI), the Coast Guard issued an IFB with a minimum bid acceptance period of sixty calendar days. The Coast Guard subsequently amended the solicitation and increased the minimum bid acceptance period to ninety calendar days. Even though AMI acknowledged the amendment, it inserted the superseded sixty calendar days as the minimum bid acceptance period. The Coast Guard rejected AMI's bid as nonresponsive because it contained conflicting bid acceptance periods. The GAO disagreed and held that AMI's acknowledgement of the amendment "indicated its acceptance of the new terms contained therein including the 90-day bid acceptance period."<sup>15</sup> AMI's inclusion of the sixty-day period in the original bid form, the GAO said, "merely demonstrates its compliance with the then required bid acceptance period."<sup>16</sup>

This past February, however, in *John P. Ingram, Jr. & Associates, Inc.*,<sup>17</sup> the GAO overruled *Alaska Mechanical, Inc.*

The facts in *Ingram* virtually were identical to those in *Alaska Mechanical, Inc.* Ingram had inserted sixty days in the blank provided on the IFB as its minimum bid acceptance period and had acknowledged the amendment that changed the minimum bid acceptance period to ninety days. As before, the agency found the bid ambiguous and rejected it as nonresponsive. Citing *Alaska Mechanical, Inc.*, Ingram protested, arguing that acknowledging the amendment evidenced its intent to offer the required ninety-day bid acceptance period. This time, the GAO agreed with the agency, and specifically overruled its decision in *Alaska Mechanical, Inc.* and other cases that followed its rationale,<sup>18</sup> finding its own reasoning in *Alaska Mechanical, Inc.* to be unsound. The GAO noted

While it is true that the specific acknowledgement of an amendment generally obligates a bidder to perform all work as subsequently changed in the amendment, (citation omitted), a bid should be considered nonresponsive where the bid also contains a provision completed by the bidder that creates an ambiguity as to whether the bid constitutes an unqualified offer to perform the work as changed by the amendment.<sup>19</sup>

In *Ingram*, the GAO held that, although the bidder acknowledged the amendment, it inserted the number "60" in the blank on the bid form designating an alternate bid acceptance period, thereby creating substantial doubt about whether the bid bound the bidder to the required ninety-day bid acceptance period.

Practitioners should alert their contracting officers to the recent change. Note, however, that the bid would have been responsive if the bidder had acknowledged the revised minimum bid acceptance period by subsequently submitting the *Standard Form 30, Amendment/Modification Form*. The subsequent acknowledgement would have evidenced the bidder's intent to be bound to the revised period. Major Cameron.

<sup>7</sup>Bidders must hold their bids open for government acceptance during the stated minimum bid acceptance period. After bid opening, offerors may not withdraw their bids during this specified period. FAR 14.407-1, 52.214-16.

<sup>8</sup>Valley Constr. Co., Inc., B-243811, Aug. 7, 1991, 91-2 CPD ¶ 138.

<sup>9</sup>For example, a bidder may no longer desire contract award because of unanticipated cost increases.

<sup>10</sup>Legeay, Inc., B-218307, Mar. 22, 1985, 85-1 CPD ¶ 338.

<sup>11</sup>General Elevator Co., B-226976, Apr. 7, 1987, 87-1 CPD ¶ 385.

<sup>12</sup>Valley Constr. Co., Inc., B-243811, Aug. 7, 1991, 91-2 CPD ¶ 138 (60-day period required, 30-day period offered).

<sup>13</sup>John's Janitorial Serv., B-219194, July 2, 1985, 85-2 CPD ¶ 20 (60-day period required; either a maximum 30-day period or an additional 30-day period offered). The government may accept a solitary bid that offers less than the minimum acceptance period. Esko & Young, Inc., B-204053, Jan. 4, 1982, 82-1 CPD ¶ 5.

<sup>14</sup>B-225260.2, Feb. 25, 1987, 87-1 CPD ¶ 216.

<sup>15</sup>*Id.* at 2.

<sup>16</sup>*Id.*

<sup>17</sup>B-250548, Feb. 9, 1993, 93-1 CPD ¶ \_\_\_\_.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*



# Army Lawyer Placement Service Note

## OTJAG Army Placement Service

### Transition Assistance After Regimental Service

On January 15, 1992, The Judge Advocate General established the Army Law Placement Service (ALPS) in support of the Army Career Alumni Program (ACAP)—a program designed to assist soldiers in their transitions to the civilian job sector during this period of downsizing in Army strength. The ALPS is designed to assist eligible judge advocates, warrant officers, and legal specialists to identify, prepare for, and obtain professional employment in the civilian sector, to include positions in local, state, and federal governments. The ALPS will provide job search information materials, assist eligible officers and enlisted soldiers to identify employment prospects, and assist them in preparing for employment interviews.

As of March, 1993, over thirty-seven members of the Regiment successfully have transitioned to second careers through the ALPS. Another seventy are in various stages of interviewing, or preparing resumes and standard forms (SF) 171.

Judge advocates and warrant officers are authorized to use this service if they are retirement eligible and have served at least two years in grade, or were not selected at least once for promotion, or were not selected for conditional voluntary indefinite or voluntary indefinite status. Officers in a promotable status are ineligible. Enlisted personnel need only be retirement eligible, denied reenlistment, or involuntarily separated solely based on downsizing criteria.

Any officer or enlisted soldier eligible for this service who desires ALPS assistance shall:

- provide a resume and an SF 171 (for federal positions);
- indicate his or her employment availability date;
- indicate if he or she is interested in state or federal employment;
- indicate geographic employment preference (consider state bar membership or ability to "waive in");
- indicate legal specialty skills (e.g., litigation, contracts, environmental law, or criminal law);

—provide details on unique qualifications (e.g., foreign language, prior service experience, nonlegal technical skills);

—provide information on special family needs (e.g., location near to military medical center or availability of special education services).

The single, greatest challenge facing an officer or enlisted soldier preparing to enter transition is to acquire a genuine appreciation of how long the job search process actually takes. Experience reflects the need to begin the job search process at least one year prior to the expected release from active duty. Understanding the nature of the legal hiring market; the importance of developing network resources; and the time needed from vision formulation, resume preparation, interviewing and offer consideration stages is more challenging than many realize.

Officers and enlisted soldiers interested in obtaining out-placement employment service first should enroll in the program at their installation ACAP office. After enrolling in the ACAP, contact Lieutenant Colonel Greg Huckabee, ALPS, Personnel, Plans, and Training, Office of The Judge Advocate General, for assistance at DSN 225-8366/1353/ or COML (703) 695-8366/1353.

On June 15, 1993, the ALPS will move from the Pentagon to Fort Belvoir, Virginia, combining resources with the Professional Recruiting Office (PRO). The name will be changed to the JAG Professional Recruiting and Placement Office. The new telephone numbers will be DSN 656-6230/6486, or COML (703) 806-6230/6486 and (800) 336-3315. The new mailing address will be the same as the former PRO address.

All members of the Regiment are requested to assist in this effort during the challenging transition process. Anyone with information on potential positions in the civilian employment sector is encouraged to contact the ALPS. Through this program, we can provide to one another the special service that we, as a Corps, have provided to the Army. Lieutenant Colonel Huckabee.

# Claims Report

## United States Army Claims Service

### Tort Claims Note

#### Claims of Department of Defense Components Other than the Military Departments

Under the provisions of Department of Defense (DOD) Directive 5515.9,<sup>1</sup> the United States Army is responsible for resolving tort claims arising out of the activities of DOD components other than the military departments. This responsibility exists worldwide except for overseas locations where the Air Force or Navy has "single-service responsibility."<sup>2</sup>

The Department of Defense Dependent Schools (DODDS) and the Defense Logistics Agency (DLA) are two examples of DOD components over which the United States Army has resolution responsibility. Overseas, the DODDS facilities generate a large number of claims, while within the United States, the DLA has the potential of generating a significant number of tort claims. The number of DLA claims is expected to increase because the DLA is in the process of assuming control over logistics facilities formerly operated by the three military departments.

Staff Judge Advocates of area claims offices should survey their areas for DOD component offices and facilities and establish a point of contact at each to ensure prompt notice of potential claims. The DOD component offices should be instructed to inform area claims offices of any incident or accident involving their personnel or operations and non-DOD civilian personnel or property if property damage results or if a potential for personal injury exists.<sup>3</sup> The principals at DODDS schools should be requested to report through their school nurses any serious injury to a child. Even in cases in which one child is injured by another, a potential for a claim may arise based on the school's failure to supervise the children properly.

Contact your area action officer at the United States Army Claims Service (USARCS) if you have questions concerning Army responsibility for DOD components operating within your area. Lieutenant Colonel Goetzke.

### Personnel Claims Note

#### Internal Damage to Electronic Items

The USARCS continues to review an increasing number of claims that create unnecessary issues concerning damage to

electronic components or items. While the General Accounting Office's (GAO) position on this issue is far from clear, adjudicators and claims officers can take several steps to help "perfect" the Army's claims against the carrier. In the absence of this information, payment to claimants may cause serious problems.

The GAO has recognized that evidence of external damage to an electronic item provides a sound basis to pursue carrier recovery. The USARCS also recognizes other forms of evidence can establish transit-related damage. The claimant's inability to establish that damage in transit has occurred inevitably will result in lost carrier recovery. Whether the Comptroller General will support the Army's arguments remains to be seen. In the interim, adjudicators should analyze this type of damage carefully.

The following is a nonexclusive list of analytical questions that an adjudicator should resolve before deciding to pay for damage to electronic items when no clear evidence of external damage to the item exists:

- Does a statement from a qualified repairman specifically identify the nature and cause of the damage (not simply a statement that the item was "possibly damaged in shipment")? Did you speak with the repairman and, most importantly, was this recorded in the claims file?
- Is the internal damage the type that likely would have been caused by rough handling (e.g., cracked circuit board, solder points loose, internal parts rattling around)? Alternately, is the damage the type that easily could have been caused by the claimant (e.g., burned out power supply on an item that was subjected to dual voltage, or parts that have dried out during long-term storage)?
- Does evidence of rough handling in the rest of the shipment exist (such as large items broken, numerous boxes crushed, large amounts of glass breakage)?
- Is the item relatively new in terms of its expected life? Does a warranty cover the item? Has the claimant inquired about the warranty?

<sup>1</sup> DEP'T OF DEFENSE, DIRECTIVE 5515.9, SETTLEMENT OF TORT CLAIMS (Sept. 12, 1990).

<sup>2</sup> DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 10-18b (28 Feb. 1990).

<sup>3</sup> One exception is the Defense Commissary Agency. See Claims Report, *Defense Commissary Agency Claims*, ARMY LAW., Jan. 1993, at 54.

- Can the claimant provide specific circumstances to help explain the damage (e.g., "I watched them put my VCR in last and pound on the box to ensure a tight fit in the crate or truck")? How was the item packed? Who packed it? Does solid evidence that the item worked prior to the move exist? (Note that the carrier is *not* responsible to inquire or test the mechanical condition of electronic items).

Simply stated, adjudicators must build a solid case to charge the carrier for damage to electronic items. Get to know

the repair firms and if uncertainty exists on a particular claim, call them. The USARCS sees too many files in which the repair firm indicates that the claimant asked it to list "shipping damage" on the estimate, even though the firm had no clear reason for doing so other than to "help the customer." A good adjudicator will resolve such a case and note his or her findings in the chronology sheet. Remember, even though the Army wants to be fair to the claimant, the claimant only is entitled to payment for damage that occurred in transit. Colonel Bush and Ms. Zink.

## Contract Law Notes

### OTJAG Contract Law Division

#### New Guidance for Economic Price Adjustment Clauses

The *Federal Acquisition Regulation (FAR)* authorizes the use of fixed-price contracts with economic price adjustments that allow for the upward or downward adjustment of the contract price upon the occurrence of specified contingencies.<sup>1</sup> In *MAPCO Alaska Petroleum, Inc. v. United States*<sup>2</sup> (MAPCO) the Claims Court (the predecessor to the Court of Federal Claims) held that an economic price adjustment (EPA) clause violated the FAR and directed the parties to reform the contract accordingly. The MAPCO decision profoundly impacted the way in which indices will be selected for future EPA clauses.

MAPCO Alaska Petroleum, Inc. (MAPCO) contracted with the Defense Fuel Supply Center (DFSC) to supply three types of fuel at various delivery points in Alaska for one year. The contract contained base prices for the fuel that were to be adjusted upward or downward during the course of perfor-

mance according to fluctuations in price indices reported in the *Petroleum Marketing Monthly*<sup>3</sup> (PMM). The PMM is a government publication that gives average fuel prices broken down by state and region, based on sales prices reported by all petroleum refiners in the United States.

During the course of the contract, the government—based on the PMM indices—decreased the contract prices by about thirty-five percent. At the same time, however, MAPCO's crude oil costs rose by ninety-five percent. MAPCO submitted a claim, requesting an adjustment based on an index of its costs rather than on the contract's PMM indices. Following the denial of this claim, MAPCO filed an appeal before the Claims Court, arguing that the PMM index violated applicable provisions of the FAR.

The Claims Court initially outlined the three types of EPA clauses allowed by the FAR<sup>4</sup> and determined that the contract's EPA clause could not be categorized as one of the three types allowed in the FAR.

<sup>1</sup> GENERAL SERVS. ADMIN. ET. AL., FEDERAL ACQUISITION REG. 16.203-1 (1 Apr. 1984) [hereinafter FAR].

<sup>2</sup> 27 Fed. Cl. 405 (1992).

<sup>3</sup> This is a monthly publication issued by the Energy Information Agency, a subdivision of the Department of Energy.

<sup>4</sup> The allowable EPAs are as follows:

(a) *Adjustments based on established prices.* These price adjustments are based on increases or decreases from an agreed-upon level in published or otherwise established prices of specific items or the contract end items.

(b) *Adjustments based on actual costs of labor or material.* These price adjustments are based on increases or decreases in specified costs of labor or material that the contractor actually experiences during contract performance.

(c) *Adjustments based on cost indexes of labor or material.* These price adjustments are based on increases or decreases in labor or material cost standards or indexes that are specifically addressed in the contract.

FAR 16.203-1.

The court found that the contract's *PMM* framework did not qualify as an adjustment based on "established prices"<sup>5</sup> and interpreted the *FAR* to allow adjustments based only on the contractor's own established prices. The court's interpretation was based, in part, on the section's limitations provision,<sup>6</sup> which refers to "the contractor's established prices."<sup>7</sup> In addition, the standard EPA clauses for adjustments based on established prices use the terms "established price" and "contractor's established price" interchangeably.<sup>8</sup> The court observed that the *PMM* indexes did not represent anyone's established prices, but merely were an amalgamation of a previous month's petroleum sales data.

The court then held that the *PMM* adjustment did not constitute a cost index within the meaning of FAR 16.203-1(c). The indices simply did not reflect MAPCO's material costs (presumably crude oil), but represented the market prices of the refined fuel being supplied. The court distinguished two earlier cases<sup>9</sup> that had allowed EPA clauses based on average sales prices for plastic resin. In both of those cases, the plastic resin, although measured by a *price* index, represented a *cost* to the contractors, who were making plastic bags as an end item.

The court rejected the Government's argument that the *PMM* clause could be allowed under FAR 16.501(c), as one based on "catalog or market prices"<sup>10</sup> because that provision did not apply to a fixed-price contract.<sup>11</sup> The court also reject-

ed the Government's argument that a "mutant" clause combining different types of adjustments should be recognized.<sup>12</sup>

Although a contracting officer can substitute an "agency-prescribed clause,"<sup>13</sup> this may not be done if this clause fails to protect against significant cost fluctuations that allowed for the use of an EPA clause in the first place under the limitations provision.<sup>14</sup>

The Government argued that the *PMM*'s failure to cover MAPCO's costs was predictable and that the contractor should have provided for this contingency in its bid. The court rejected this argument and held that the inclusion of such contingencies was one of the very things the EPA clause was designed to eliminate.<sup>15</sup> The court rejected a similar argument that, by entering into the contract, MAPCO had assumed the risk that the *PMM* scheme would not cover a cost increase and that it therefore had waived its right to protest. "When a contract clause drafted by the Government is inconsistent with law, whether the [contractor] inquired, protested, accepted or otherwise assumed any risks regarding the same is not controlling; the impropriety will not be allowed to stand."<sup>16</sup>

The court concluded that the *FAR* did not authorize the *PMM* index EPA clause used in the contract and that its use was also inconsistent with the *FAR*. Citing *Beta Systems v. United States*<sup>17</sup> and *Craft Machine Works, Inc.*, the court held

<sup>5</sup>FAR 16.203-1(a).

<sup>6</sup>This section reads as follows:

A fixed-price contract with economic price adjustment shall not be used unless the contracting officer determines that it is necessary either to protect the contractor and the Government against significant fluctuations in labor or material costs or to provide for contract price adjustment in the event of changes in the contractor's established prices.

FAR 16-203-3.

<sup>7</sup>*Id.* (emphasis added). The court noted that in the predecessor of the *FAR*, the *Defense Acquisition Regulations (DAR)* Gov't Cont. Rep. (CCH) ¶ 32,737.15 (DAC 76-16 Aug. 1 1978), the limitations provision, DAR 3-404.3(a), had proceeded the listing of the three types of adjustments. DAR 3-404.3(b). The meaning of established prices given to the latter by the limitations clause carried over when the *DAR* sections were adopted verbatim (although in reverse order) for the *FAR*. See *MAPCO Ala. Petroleum v. United States*, No. 550-89C, slip op. at 5-7 (Cl. Fed. Cl. Dec. 22, 1992).

<sup>8</sup>FAR 52.216-2 and -3.

<sup>9</sup>*Glopak Corp. v. United States*, 851 F.2d 334 (Fed. Cir. 1988); *American Transparents Plastic Corp.*, 83-2 Comp. Gen. ¶ 539 (Nov. 8, 1983).

<sup>10</sup>See FAR 15.804-3(c).

<sup>11</sup>The court assumed, *arguendo*, that the contract could be construed as one for indefinite delivery.

<sup>12</sup>The court stated, "Even if such a hybrid contract served defendant's purposes, it is not contemplated by the regulations. While the Government can be commended for adaptability in conforming its argument to the developing exigencies of the case, its briefing has evolved beyond the permissible scope of the regulation." *MAPCO*, slip op. at 19.

<sup>13</sup>FAR 16.203-4(a).

<sup>14</sup>FAR 16.203-3. The Claims Court concluded: "For the 'Limitations' section to have an effect, it must serve not only as an entry point for using an EPA clause, but also as the method to justify the clause actually used." *MAPCO*, slip op. at 12.

<sup>15</sup>The court quoted *Craft Mach. Works, Inc.*, ASBCA No. 35167, 90-3 BCA ¶ 23,095 in which the Armed Services Board of Contract Appeals stated that "the Government ignores the fact that the very purpose of the EPA clause, as stated in the regulations, is to eliminate contingencies from a bid that would otherwise [include them] . . . and to cover them separately under the EPA clause. . . . This raises the serious question [of] whether the Government's purported encouragement of contingencies is consistent with its own regulations." *Id.* at 115,969.

<sup>16</sup>*MAPCO*, slip op. at 19, quoting *Craft Mach. Works, Inc.*, No. 35167, 90-3 BCA ¶ 23,095.

<sup>17</sup>838 F.2d 1179 (Fed. Cir. 1988).

that because the EPA clause violated the procurement regulation, the Government could not legally benefit from it.<sup>18</sup>

The *MAPCO* case effectively requires the drafters of EPA clauses containing adjustments based on cost indices to select material indices<sup>19</sup> that represent potential costs for a particular solicitation. Adjustments will be made only for categories of material subject to significant fluctuations that represent a significant cost element. When the proportion of material costs subject to adjustment is high, special caution is necessary. Instead of using a material index that closely represents the end item, indices that represent the costs of separate components of the item should be selected. Major Howlett.

### GAO Analysis of the Unbalanced Bid

The General Accounting Office (GAO) recently decided two cases involving allegations of unbalanced bidding for multi-year service contracts.

A materially unbalanced bid generally must be rejected.<sup>20</sup> The GAO has prescribed a two-part analysis for determining whether a bid is unbalanced. First, the contracting officer must examine the bid to determine whether it is mathematically unbalanced—that is, whether it contains nominal prices for some work and inflated prices for other work.<sup>21</sup> In multi-year contracts requiring approximately the same level of work across all contract years, large price disparities between the base and option period are *prima facie* evidence of mathematical unbalancing.<sup>22</sup> Second, if mathematically unbalanced, the contracting officer must examine the bid to determine whether it is materially unbalanced—that is, whether reasonable doubt exists that the offer would result in the lowest overall cost to the Government.<sup>23</sup>

*Residential Refuse Removal, Inc.*<sup>24</sup> articulated GAO's mathematically unbalanced component. The solicitation in *Resi-*

*dential Refuse* contemplated award of a contract for one year, with four option years, to provide waste removal services to Fort Bragg, Camp Mackall, and Pope Air Force Base, North Carolina. The GAO held that the bidder's option year prices, which were twenty-four to sixty-percent lower than its base-year price, suggested mathematical unbalancing.

In rejecting both the Army's and the bidder's argument that price differentials of up to eighty-one percent previously had been allowed,<sup>25</sup> the GAO stated, "The assessment of whether a bid is mathematically unbalanced does not merely involve a comparison of the percentage differentials between base and option period prices; the determinative question is whether the pricing structure is reasonably related to the actual costs to be incurred in each year of the contract."<sup>26</sup> The GAO found that, because the level of services required during each year of the contract basically remained constant, the significant differences in prices between the base and option years did not appear to be reasonably related to the services required.<sup>27</sup> Therefore, the GAO held that the bid was mathematically unbalanced.

In *DGS Contract Services, Inc.*,<sup>28</sup> the GAO citing *Residential Refuse*, upheld the contracting officer's rejection of a bid as materially unbalanced. In *DGS Contract Services*, the invitation for bids contemplated an award of a firm-fixed price contract for washers and dryers at Fort Sill, Oklahoma, for a one-year base period and four one-year options. The GAO reiterated its pronouncement in *Residential Refuse* that price differentials between the base and option periods are not dispositive as long as the differentials reflect the actual costs to be incurred.<sup>29</sup> The GAO ruled that when the price differential between the base and two succeeding option years were three to four times higher than the final two option years and the level of work remained constant, the bid is mathematically unbalanced.<sup>30</sup> The GAO also noted that the bid fails to become low until the final month of the final option year.

<sup>18</sup> Although the court did not specify the remedy to which *MAPCO* was entitled, other cases indicate that reformation of the EPA clause to provide an appropriate adjustment would be required. See *Beta Sys. Inc. v. United States*, 838 F.2d 1179, 1186 (Fed. Cir. 1988).

<sup>19</sup> *MAPCO* does not affect selection of labor indices.

<sup>20</sup> FAR 14.404-2(g); FAR 15.814(c). The rule applies to sealed bid contracts and to negotiated procurements involving fixed-price supply contracts requiring a first article unit when an excessively high payment for the first article amounts to a prohibited advance payment. *Aydin Corp.*, B-245461, Jan. 13, 1992 (unpublished); *Signal Corp.*, B-241849, Feb. 26, 1991, 91-1 CPD ¶ 218 (rule not relevant when award selection not based on low cost).

<sup>21</sup> E.g., *Westbrook Indus., Inc.*, B-245019.2, Jan. 7, 1992, 92-1 CPD ¶ 30.

<sup>22</sup> *Id.*

<sup>23</sup> FAR 14.404-2(g); FAR 15.814(b); *Inventory Accounting Serv.*, B-245906, Jan. 27, 1992, 92-1 CPD ¶ 116.

<sup>24</sup> B-247198, B-247198.6, Dec. 29, 1992, 72 Comp. Gen. ¶ 92-2 CPD ¶ 444.

<sup>25</sup> *Tri-Cor Indus., Inc.*, B-248160, B-248161, July 27, 1992, 92-2 CPD ¶ 56.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.*

<sup>28</sup> B-250306, Jan. 15, 1993, 93-1 CPD para. ¶ 49.

<sup>29</sup> See *Glen Indus. Co.*, B-248223, May 19, 1992, 92-1 CPD ¶ 453 (bid not unbalanced when RFP invited front-loading of equipment purchase costs).

<sup>30</sup> *DGS*, B-250306, Jan. 15, 1993, 93-1 CPD ¶ 49 at 3.

The two cases illustrate several useful points. First, the bidder's reasons for front-loading costs generally are not determinative. In both *Residential Refuse* and *DGS Contract Services*, the GAO rejected bidders' arguments that their higher initial costs reflected the actual costs to be incurred from buying equipment to perform the contracts. Such arguments have been termed "admissions" that the bid is front-loaded;<sup>31</sup> "generic" equipment costs are expected to be amortized across all contract periods.<sup>32</sup> Front-loading equipment costs are permitted only when the solicitation invites it<sup>33</sup> or the equipment would have little value to the industry if the contract were terminated early.<sup>34</sup> A bidder's choice of accounting method, no matter how proper, also is not persuasive.<sup>35</sup>

Second, the GAO will find a bid to be materially unbalanced when large price differentials exist between the bidder's base and option periods and when the level of work remains roughly constant throughout the contract period. Although the GAO refuses to be bound to a "particular mathematical formula,"<sup>36</sup> the GAO has found deviations of twenty-four to sixty-two percent between the base and option year prices to "suggest [that] mathematical unbalancing may be present."<sup>37</sup>

Finally, self-serving agency assurances of an intent to exercise all option periods may not carry much weight. The GAO

noted the possibility of "intervening events" that could cause the contract not to run to completion.

Such intervening events relate not only to the agency's procurement plans to exercise all options, but also to the risk that future requirements could change, such that the options no longer reflect the government's actual requirements, or that termination for default may be necessary before a front-loaded contract price actually provides the lowest ultimate cost to the government.<sup>38</sup>

Accordingly, the later in the contract period that the bid becomes low, the more likely the GAO will find the bid to be materially unbalanced.

In unbalanced bidding cases, contracting officers should pay particular attention to the pricing structure of the bid to ensure that the bid reasonably relates to the actual costs to be incurred during each year of the contract. Neither the agency's assurances of exercising the options, nor the bidder's business decisions, will save a bid containing significant price differentials between base and option periods when the level of work remains roughly constant throughout the contract. Captain Kohns.

<sup>31</sup> See *id.* at 3; *Westbrook Indus. Inc.*, B-245019.2, Jan. 7, 1992, 92-1 CPD ¶ 30.

<sup>32</sup> *DGS*, B-250306, Jan. 15, 1993, 93-1 CPD ¶ 49 at 4.

<sup>33</sup> *Glen Indus. Co.*, B-248223, May 19, 1992, 92-1 CPD ¶ 453.

<sup>34</sup> E.g., *Mitco Water Labs, Inc.*, B-249269, Nov. 2, 1992, 92-2 CPD ¶ \_\_. Circumstances permitting front-loading are rare. See *Roan Corp.*, B-211228, Jan. 25, 1984, 84-1 CPD ¶ 116 (front-loading permitted for lease of fleet of law enforcement vehicles).

<sup>35</sup> *Residential Refuse*, B-247198, B-247198.6, Dec. 29, 1992, 72 Comp. Gen. ¶ 92-2 CPD ¶ 444; *Government Leasing Corp.*, B-245939, Jan. 27, 1992, 92-1 CPD ¶ 117.

<sup>36</sup> *Residential Refuse*, B-247198, B-247198.6, Dec. 29, 1992, 72 Comp. Gen. ¶ 92-2 CPD ¶ 444 at n.2.

<sup>37</sup> *Id.* at 4.

<sup>38</sup> *Id.* at n.6; see *DGS*, B-250306, Jan. 15, 1993, 93-1 CPD ¶ 49 at 4.

## Professional Responsibility Notes

### OTJAG, Standards of Conduct Office

#### Ethical Awareness

The following case summaries describe the application of the Army's Rules of Professional Conduct for Lawyers<sup>1</sup> to actual professional responsibility cases. These items serve not only as precedent, but also as training vehicles for Army

lawyers as they ponder difficult issues of professional discretion.

To stress education, while also protecting privacy interests, neither the identity of the offices nor the name of the subjects have been published. Mr. Eveland.

<sup>1</sup> DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].

## Case Summaries

### Army Rule 8.4 (Misconduct)

*Command Judge Advocate sexually harassed subordinates, secretly recorded conversations, and used "hot line" for personal calls.*

An anonymous letter to The Judge Advocate General (TJAG) made numerous charges of fraud, waste, abuse, and personal misconduct against Major X, a Command Judge Advocate. The preliminary screening official (PSO) appointed to investigate the charges found most of them to be groundless. Substantial evidence, however, did support allegations that Major X sexually harassed subordinates, set his tape recorder secretly to record conversations to which he was not a party, and used his "hot line" for personal calls.

### *Sexual Harassment*

The PSO found that Major X made deliberate sexual comments to two female subordinates. One, First Lieutenant Y, detailed several offensive comments. According to her, Major X once asked, "Why don't you wear a skirt? I like to look at your legs." Another time he asked, "Why do you wear those ugly glasses? You have such beautiful eyes." Still another time he told Lieutenant Y that he would love to go somewhere with her when they were not in their military uniforms.

In his defense, Major X told the PSO that, when instructing Lieutenant Y on how to give effective briefings, he told her to use all of her assets, including her smile and articulation skills. He was giving her guidance—not harassment—when he talked to her about her skirt and told her that she looked better without her glasses.

After Lieutenant Y sought help from Mr. C., a supervisory attorney, Major X made fewer remarks to her—but did not stop totally. Lieutenant Y's sworn statement alleged how, after she complained to Mr. C., Major X became upset and told her she should not have discussed her "personal business" with a third person. Then, according to Lieutenant Y, Major X began placing anonymous, annoying phone calls to her. She received some calls at work late in the day, after the office staff had departed and she received other calls at home. According to Lieutenant Y, Major X attempted to disguise his voice, refused to identify himself, and criticized her phone manners. He did not, however, discuss sexual matters.

Lieutenant Y finally complained informally to the Inspector General's (IG) office, after which the annoying phone calls

and most of the offensive remarks ceased. Because Major X steadfastly denied making any phone calls to Lieutenant Y, the PSO was unable to conclude whether or not they in fact occurred; he could only surmise that if Major X were the caller, his only motivation would have been harassment.

Another object of Major X's unwelcome remarks was Ms. Z, a civilian paralegal. Her sworn statement alleged that Major X commented that she never had married and told her that if she lost weight she might have more dates.

Although Major X denied improper intent in making the comments, both subordinates were offended and the PSO determined that Major X's conduct constituted sexual harassment.<sup>2</sup>

The PSO substantiated other patterns in the office, which, although not amounting to misconduct, did aggravate the perception that Major X was involved in improper relationships. Four subordinates' sworn statements remarked that his conduct gave the impression of being involved in adultery. In one case, because Major X seemed to spend endless hours visiting the office of Ms. Q, a favored, temporarily-hired subordinate attorney, rumors flourished of an intimate affair. In another instance, Major X intervened in a proposed disciplinary action against Ms. B, a personal acquaintance. Major X so antagonized the civilian personnel officer (CPO) by taking Ms. B's side that the CPO complained to the IG.

Another situation generated even more rumors. Several times each week, especially after "Judith" called on Major X's "hot line" (unlisted commercial telephone line intended for headquarters staff business only), some people remembered his disappearance for two or more hours. No one, however, definitely could identify what Major X did or where he went. Major X explained to the PSO that Judith and he were church officers. Moreover, Major X had a sister, Judith, who also called him on the "hot line." Judith told the PSO that her family shared a garden plot with Major X's family and that Major X's daughters baby sat her children. Both Major X and Judith denied any impropriety.

### *Nonconsensual Recording of Conversations*

Everyone agreed that Major X openly taped office meetings.<sup>3</sup> On one occasion, however, an attorney using Major X's office discovered that his conversations had been recorded secretly by Major X's tape recorder, which he found buried under books and papers (in the voice activation mode). On another occasion, following a meeting with Major X, two subordinates noticed the tape recorder in the voice activation mode under some papers. The PSO found that, with the exception of law enforcement personnel, no legal prohibitions

<sup>2</sup>DEP'T OF ARMY, REG. 600-20, PERSONNEL—GENERAL: ARMY COMMAND POLICY, para. 6-4(b) (Int. Change No. I-02, 1 Apr. 1992) ("Any soldier or civilian employee . . . [w]ho makes deliberate or repeated unwelcomed verbal comments, gestures, or physical contact of a sexual nature is engaging in sexual harassment"). This latest regulatory definition of sexual harassment focuses simply on the *unwelcomed* aspect of remarks. An earlier version, in effect at the time of Major X's utterances, required that remarks be *offensive* to the person addressed.

<sup>3</sup>ABA Comm. on Professional Ethics and Grievances, Informal Op. 1357 (1975) (tape recording public hearings when no secret about the practice exists and the tape recorder is visible is not unethical).

existed against nonconsensual recording, although some might consider it bad etiquette.<sup>4</sup>

### *Personal Use of Hot Line*

The PSO found that Major X received personal calls on his hot line. The impropriety of this was not apparent, especially because the commanding general explained to the PSO that he himself received personal calls on his own "hot line."

Because the incidents were not unique to judge advocates, TJAG, concurring with the PSO's findings and recommendation, referred the matter to Major X's commander for action.

### **Army Rule 1.1 (Competence)**

### **Army Rule 4.4 (Respect for Rights of Third Persons)**

*Trial Counsel's improper introduction of legally irrelevant testimony of perceived misconduct by opposing counsel, although incompetent representation, was not disrespect for opposing lawyers' rights as purpose had not been to embarrass or burden the lawyers.*

Captain A, a trial counsel (TC), called the sixteen-year-old victim in a carnal knowledge prosecution to provide impact testimony during sentencing. When asked why she temporarily was living away from home, she testified that the accused's attorneys had told her to get out of town for three weeks.

This response touched off a salvo of ethical charges and countercharges between the prosecution and defense, which resulted in the supervisory judge advocate appointing a PSO. This synopsis focuses on the inquiry against Captain A,<sup>5</sup> who explained to the PSO that his purpose had been to demonstrate the crime's impact on the victim.

The PSO, after analyzing the case, decided that the victims' testimony did not constitute proper evidence in aggravation because it examined the defense counsel's misconduct—not the accused's misconduct. If the accused had caused the victim to leave town, then the testimony may have been relevant. To admit illegal and unprofessional conduct on the part of defense counsel against an accused would be punishing the accused for using a lawyer.

The PSO found that because Captain A *believed* that producing such evidence was proper, he did not violate rule 4.4;<sup>6</sup> his purpose had not been to embarrass or burden the defense counsel. Although the victim's testimony embarrassed the defense counsel, that was not Captain A's goal. The PSO presumed that if Captain A had been more familiar with ethical rules, he would have avoided the improper testimony. The PSO stressed that trial attorneys and their supervisors must be intimately familiar with ethical rules concerning the accused, witnesses, and opposing counsel.

The supervisory JA's review of the PSO's report found a shortcoming in the TC's competence amounting to a minor violation of rule 1.1.<sup>7</sup> Because of Captain A's relative inexperience as a TC, the supervisory JA concurred with the PSO that counseling and admonishment by Captain A's staff judge advocate would be adequate.

<sup>4</sup> *Contra* ABA Comm. on Professional Ethics and Grievances, Formal Op. 337 (1974) (Predicated on rules against dishonesty, fraud, deceit, and misrepresentation, it is unethical—even when legal under federal and state law and neither civilly nor criminally punishable—for attorneys secretly to record conversations. Even in hypothetically extraordinary circumstances—when a prosecuting attorney ethically might make and use secret recordings within strict statutory and constitutional requirements—such taping practices, although not considered illegal, would not necessarily be seen as ethical. See ABA Comm. on Professional Ethics and Grievances, Informal Op. 1320 (1975) (reconsidering and approving Formal Op. 337); ABA Comm. on Professional Ethics and Grievances, Informal Op. 1407 (1975) (condemning proposed secret recording of lawyer-client conversation by state supreme court disciplinary authorities with consent of client). Compare Thomas D. Morgan & Ronald D. Rotunda, *Problems and Materials on Professional Responsibility*, 326-28 (1981) (questioning soundness of ABA Formal Op. 337, particularly its effect of placing private attorneys under stricter ethical standards than prosecuting attorneys).

<sup>5</sup> The PSO found the two defense counsels' conduct to be ethical. Nevertheless, because they failed to consider the victim's age and mental condition in making certain statements, they may have given her the wrong impression that she should leave town.

<sup>6</sup> AR 27-26, *supra* note 1, rule 4.4.

<sup>7</sup> *Id.* rule 1.1.

## **Regimental News From the Desk of the Sergeant Major**

*Sergeant Major John A. Nicolai*

### **Senior Legal Noncommissioned Officers Management Course**

New doctrinal developments; transition, base realignment, and closure issues; and rightsizing the force structure require

the senior leadership in the noncommissioned officers (NCO) Corps to remain current on decisions and policies that affect installations, soldiers, and families. To ensure that this information reaches the field, I strongly encourage each active, Reserve, and National Guard activity in the Judge Advocate



General's Corps (JAGC) to send its chief legal NCO to the 4th Senior Legal NCO Management Course, scheduled for 16 to 20 August 1993, at The Judge Advocate General's School. If the chief legal NCO cannot attend, the next most senior legal NCO should attend the course. Because most chief legal NCOs previously have attended this course, the one-time attendance restriction has been lifted. This is a one-time waiver and applies only to the August 1993 course. Regardless of the last time a chief legal NCO attended, he or she may attend the 1993 course. This exception, however, does not waive other qualifications; completing the nonresident Administration and the Law for Legal NCO courses are still required. Completing these courses remains critical; the 1992 course had to be cancelled because of a lack of qualified applicants. Senior legal NCOs in the JAGC—having the duty and responsibility to set the example and enforce the standard—never should fall short of these obligations.

### **Legal Automation Army-Wide System Bulletin Board System**

As the number of users grows and the capability of the system increases, the Information Management Office, Office of The Judge Advocate General, is implementing changes to the Legal Automation Army-Wide System Bulletin Board System (LAAWS BBS). In addition, the warrant officers have formed a conference on the LAAWS BBS—the Legal Administration Conference is available for use exclusively by nonattorney civilians and enlisted personnel in either the active, Reserve, or National Guard affiliated with the JAGC.

I expect all chief legal NCOs to log on to the LAAWS BBS and to use it. The LAAWS BBS will become the primary means of disseminating and sharing information within the JAG community. This system should reduce the time spent trying to communicate over busy telephone lines. The JAGC's enlisted soldiers schools' instructors and coordinators, developers, proponent NCOs, personnel managers, and I routinely will post information of general interest. School selections, promotions, new developments in training and testing, qualifications for special assignments or course attendance, civilian job opportunities, and assignment policies represent only a few of the topics that will be disseminated.

I also expect NCOs to share their experiences of events occurring in the field that are of general interest to others—

such as selections of soldiers and NCOs of the month, quarter, or year, as well as significant contributions by soldiers. Every chief legal NCO should assist legal NCOs and specialists wanting to log onto the LAAWS BBS. The point of contact for LAAWS BBS is Sergeant First Class Tim Nugent (703) 805-3988.

### **Army Law Placement Service**

While visiting a number of installations, I found that many retirement-eligible NCOs are unaware of the opportunities available to them through the Army Law Placement Service. Either these NCOs are not reading *The Army Lawyer*, or they do not have access to the LAAWS BBS. Both of these media have carried articles outlining this placement program. We need to ensure that this information reaches its intended audience. These NCOs have given years of service to both the Army and the JAG Corps and we should make their transitions to the civilian community as painless and as positive as possible. Providing this information takes on added importance as new retirement programs are implemented.

### **Court Reporter Course**

*Court Reporting Information*, an article printed in the April 1993 issue of *The Army Lawyer*, outlined the application process and qualifications necessary for attending the Court Reporter Course at the Naval Justice School, Newport, Rhode Island. Ironically, while that article was being submitted for publication, three of the six Army attendees had to be returned to their home stations as unqualified for attendance. Two of the soldiers merely let their typing skills deteriorate after taking the typing test required as part of the application process. When retested—as part of the enrollment process—they failed to attain scores high enough to qualify them for retention as legal NCOs, let alone as court reporters. The third soldier arrived with a forged test result and failed the enrollment typing test. The first two applicants demonstrated leadership and motivation deficiencies. The third applicant's failure—simply put—indicated misconduct during the application process. Both situations are unacceptable. Once an applicant is accepted for training, the chief legal NCO must monitor the applicant's continued proficiency. The JAGC faces a drastic shortage of court reporters; we must not continue to waste training quotas by sending unqualified soldiers.

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## **CLE News**

### **1. Resident Course Quotas**

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by means of the Army Training Require-

ments and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent

agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

## 2. TJAGSA CLE Course Schedule

### 1993

7-11 June: 118th Senior Officer Legal Orientation Course (5F-F1).

7-11 June: 23d Staff Judge Advocate Course (5F-F52).

14-25 June: JA Officer Advanced Course, Phase II (5F-F58).

14-25 June: JA Triennial Training (5F-F57).

12-16 July: 4th Legal Administrators Course (7A-550A1).

14-16 July: 24th Methods of Instruction Course (5F-F70).

19 July-24 September: 131st Officer Basic Course (5-27-C20).

19-30 July: 132d Contract Attorneys Course (5F-F10).

2 August 93-13 May 94: 42d Graduate Course (5-27-C22).

2-6 August: 54th Law of War Workshop (5F-F42).

9-13 August: 17th Criminal Law New Developments Course (5F-F35).

16-20 August: 11th Federal Litigation Course (5F-F29) (formally conducted in October/November).

16-20 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

23-27 August: 119th Senior Officer Legal Orientation Course (5F-F1).

30 August-3 September: 16th Operational Law Seminar (5F-F47).

20-24 September: 10th Contract Claims, Litigation, and Remedies Course (5F-F13).

## 3. Civilian Sponsored CLE Courses

### August 1993

17-20: ESI, Contract Pricing, Denver, CO.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the March 1993 issue of *The Army Lawyer*.

## 4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June biennially
Wisconsin*	20 January biennially
Wyoming	30 January annually

For addresses and detailed information, see the January 1993 issue of *The Army Lawyer*.

\*Military exempt

\*\*Military must declare exemption

## Current Material of Interest

### 1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

#### Contract Law

- AD A239203 Government Contract Law Deskbook Vol 1/ JA-505-1-91 (332 pgs).
- AD A239204 Government Contract Law Deskbook, Vol 2/ JA-505-2-91 (276 pgs).
- AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

#### Legal Assistance

- AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
- AD A248421 Real Property Guide—Legal Assistance/JA-261-92 (308 pgs).
- \*AD A259516 Legal Assistance Guide: Office Directory/ JA-267(92) (110 pgs).
- AD B164534 Notarial Guide/JA-268(92) (136 pgs).
- AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).
- AD A246325 Soldiers' and Sailors' Civil Relief Act/JA-260(92) (156 pgs).
- AD A244874 Legal Assistance Wills Guide/JA-262-91 (474 pgs).
- AD A244032 Family Law Guide/JA 263-91 (711 pgs).
- AD A241652 Office Administration Guide/JA 271-91 (222 pgs).
- AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).
- AD A241255 Model Tax Assistance Guide/JA 275-91 (66 pgs).
- AD A246280 Consumer Law Guide/JA 265-92 (518 pgs).
- AD A259022 Tax Information Series/JA 269(93) (117 pgs).
- AD A256322 Legal Assistance: Deployment Guide/JA-272(92) (364 pgs).
- \*AD A260219 Air Force All States Income Tax Guide—January 1993

#### Administrative and Civil Law

- AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
- AD A258582 Environmental Law Deskbook, JA-234-1(92) (517 pgs).
- AD A255038 Defensive Federal Litigation/JA-200(92) (840 pgs).
- AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

AD A255064 Government Information Practices/JA-235(92) (326 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

### Labor Law

AD A256772 The Law of Federal Employment/JA-210(92) (402 pgs).

AD A255838 The Law of Federal Labor-Management Relations/JA-211-92 (430 pgs).

### Developments, Doctrine and Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

### Criminal Law

\*AD A260531 Crimes and Defenses Deskbook/JA 337(92) (220 pgs).

\*AD A260913 Unauthorized Absences/JA 301(92) (86 pgs).

AD A251120 Criminal Law, Nonjudicial Punishment/JA-330(92) (40 pgs).

AD A251717 Senior Officers Legal Orientation/JA 320(92) (249 pgs).

AD A251821 Trial Counsel and Defense Counsel Handbook/JA 310(92) (452 pgs).

\*AD A261247 United States Attorney Prosecutions/JA-338(92) (343 pgs).

### Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

\*Indicates new publication or revised edition.

## 2. Regulations and Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander  
U.S. Army Publications Distribution Center  
2800 Eastern Blvd.  
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

### (I) Active Army.

(a) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam. 25-33.)

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division*

level and above. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam. 25-33.

**If your unit does not have a copy of DA Pam. 25-33, you may request one by calling the Baltimore USAPDC at (301) 671-4335.**

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 5-14	Management of Contracted Advisory and Assistance Services	15 Jan 93
AR 30-18	Army Troop Issue Subsistence Activity Operating Policies	4 Jan 93
AR 135-156	Military Publications Personnel Management of General Officers, Interim Change 101	1 Feb 93
CIR 11-92-3	Internal Control Review Checklist	31 Oct 92
CIR 608-93-1	The Army Family Action Plan X	15 Jan 93
JFTR	Joint Federal Travel Regulations, Change 75	1 Mar 93
UPDATE 16	Enlisted Ranks Personnel Update Handbook, Change 3	27 Nov 93

### 3. LAAWS Bulletin Board Service

a. The Legal Automated Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) dedicated to serving the Army legal community and certain approved DOD agencies. The LAAWS BBS is the successor to the OTJAG BBS formerly operated by the OTJAG Information Management Office. Access to the LAAWS BBS currently is restricted to the following individuals:

- 1) Active-duty Army judge advocates;
- 2) Civilian attorneys employed by the Department of the Army;
- 3) Army Reserve and Army National Guard judge advocates on active duty, or employed full time by the federal government;
- 4) Active duty Army legal administrators, noncommissioned officers, and court reporters;
- 5) Civilian legal support staff employed by the Judge Advocate General's Corps, U.S. Army;
- 6) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, HQS);
- 7) Individuals with approved, written exceptions to policy.

Requests for exceptions to the access policy should be submitted to the following address:

LAAWS Project Officer  
Attn: LAAWS BBS SYSOPS  
Mail Stop 385, Bldg 257  
Fort Belvoir, Va. 22060-5385

b. Effective 2 November 1992, the LAAWS BBS system was activated at its new location, the LAAWS Project Office at Fort Belvoir, Virginia. In addition to this physical transition, the system has undergone a number of hardware and software upgrades. The system now runs on a 80486 tower, and all lines are capable of operating at speeds up to 9600 baud. While these changes will be transparent to the majority of users, they will increase the efficiency of the BBS, and provide faster access to those with high-speed modems.

c. Numerous TJAGSA publications are available on the LAAWS BBS. Users can sign on by dialing commercial (703) 805-3988, or DSN 655-3988 with the following telecommunications configuration: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask a new user to answer several questions and tell him or her that access will be granted to the LAAWS BBS after receiving membership confirmation, which takes approximately twenty-four hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files From the LAAWS Bulletin Board Service.*

(1) Log on to the LAAWS BBS using ENABLE and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. To download it on to your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when asked to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the "ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging on to the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.



(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip(space)xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
1990_YIR.ZIP	January 1991	1990 Contract Law Year in Review in ASCII format. It was originally provided at the 1991 Government Contract Law Symposium at TJAGSA.
1991_YIR.ZIP	January 1992	TJAGSA Contract Law 1991 Year in Review Article.
505-1.ZIP	June 1992	Volume 1 of the May 1992 Contract Attorneys Course Deskbook.
505-2.ZIP	June 1992	Volume 2 of the May 1992 Contract Attorneys Course Deskbook.
506.ZIP	November 1991	TJAGSA Fiscal Law Deskbook, Nov. 1991.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
93CLASS.ASC	July 1992	FY TJAGSA Class Schedule; ASCII.
93CLASS.EN	July 1992	FY TJAGSA Class Schedule; ENABLE 2.15.
93CRS.ASC	July 1992	FY TJAGSA Course Schedule; ASCII.
93CRS.EN	July 1992	FY TJAGSA Course Schedule; ENABLE 2.15.
ALAW.ZIP	June 1990	<i>The Army Lawyer/Military Law Review Database</i> (Enable 2.15). Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
CCLR.ZIP	September 1990	Contract Claims, Litigation, Litigation, & Remedies
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook
FSO_201.ZIP	October 1992	Update of FSO Automation Program
JA200A.ZIP	August 1992	Defensive Federal Litigation, Part A, Aug. 92
JA200B.ZIP	August 1992	Defensive Federal Litigation, Part B, Aug. 92
JA210.ZIP	October 1992	Law of Federal Employment, Oct. 92
JA211.ZIP	August 1992	Law of Federal Labor-Management Relations, July 92
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction
JA235-92.ZIP	August 1992	Government Information Practices, July 92. Updates JA235.ZIP.
JA235.ZIP	March 1992	Government Information Practices
JA241.ZIP	March 1992	Federal Tort Claims Act
JA260.ZIP	October 1992	Soldiers' and Sailors' Civil Relief Act Update, Sept. 92
JA261.ZIP	March 1992	Legal Assistance Real Property Guide
JA262.ZIP	March 1992	Legal Assistance Wills Guide

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA267.ZIP	March 1992	Legal Assistance Office Directory
JA268.ZIP	March 1992	Legal Assistance Notarial Guide
JA269.ZIP	March 1992	Federal Tax Information Series
JA271.ZIP	March 1992	Legal Assistance Office Administration Guide
JA272.ZIP	March 1992	Legal Assistance Deployment Guide.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References
JA275.ZIP	March 1992	Model Tax Assistance Program
JA276.ZIP	March 1992	Preventive Law Series
JA281.ZIP	March 1992	AR 15-6 Investigations
JA285.ZIP	March 1992	Senior Officers' Legal Orientation
JA285A.ZIP	March 1992	Senior Officers' Legal Orientation Part 1/2
JA285B.ZIP	March 1992	Senior Officers' Legal Orientation Part 2/2
JA290.ZIP	March 1992	SJA Office Manager's Handbook
JA301.ZIP	July 1991	Unauthorized Absence—Programmed Text, July 92
JA310.ZIP	July 1992	Trial Counsel and Defense Counsel Handbook, July 1992
JA320.ZIP	July 1992	Senior Officers' Legal Orientation Criminal Law Text, May 92
JA330.ZIP	July 1992	Nonjudicial Punishment—Programmed Text, Mar. 92
JA337.ZIP	July 1992	Crimes and Defenses Deskbook, July 92
JA4221.ZIP	May 1992	Operational Law Handbook, Disk 1 of 2
JA4222.ZIP	May 1992	Operational Law Handbook, Disk 2 of 2
JA509.ZIP	Oct 1992	TJAGSA Deskbook from the 9th Contract Claims, Litigation, & Remedies Course held Sept. 92

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JAGSCHL.ZIP	Mar 1992	JAG School Report to DSAT
ND-BBS.ZIP	July 1992	TJAGSA Criminal Law New Developments Course Deskbook, Aug. 92
V1YIR91.ZIP	January 1992	Section 1 of the TJAGSA's Annual Year in Review for CY 1991 as presented at the Jan 92 Contract Law Symposium
V2YIR91.ZIP	January 1992	Volume 2 of TJAGSA's Annual Review of Contract and Fiscal Law for CY 1991
V3YIR91.ZIP	January 1992	Volume 3 of TJAGSA's Annual Review of Contract and Fiscal Law for CY 1991
YIR89.ZIP	January 1990	Contract Law Year in Review—1989

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, a request from an IMA must contain a statement which verifies that he or she needs the requested publications for purposes related to his or her military practice of law.

g. Questions or suggestions concerning the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SFC Tim Nugent, COMM (703) 805-2922, DSN 655-2922, or at the address in paragraph a, above.

#### 4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"



b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

#### **5. The Army Law Library System**

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the

point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are DSN 274-7115, ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

